



January 2016  
AK Position Paper

# The New Single Market Strategy of the European Union COM(2015) 550 final

## About us

**The Austrian Federal Chamber of Labour is by law representing the interests of about 3.4 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 Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.**

**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 3.4 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Rudi Kaske  
President

Werner Muhm  
Director

## Executive Summary

The EU Single Market Policy pursued hitherto and oriented almost exclusively to economic interests has missed the mark. This is shown by the catastrophic economic data for the EU as well as by the unprecedented figures for unemployment and poverty in the European Union. Today one quarter of the EU's population is at risk of poverty. A key aim must be to implement measures that protect the interests of workers and support employees in their role as consumers. This is the only way to get the European Single Market on course for growth.

**Labour Mobility Package:** By far the largest percentage of labour mobility takes place from Member States with low wages to Member States with higher wages. Data clearly support the fact that wage and social dumping is the main reason for the posting of workers. Pseudo posting occurs frequently. The BAK calls on the Commission to implement measures that prevent the current downwards trend in wage and social competition.

The BAK welcomes measures to **establish tax equity** and calls for the introduction of a common corporation tax base, a minimum corporate tax rate and mandatory country-by-country reporting for companies.

**The "collaborative economy":** the BAK calls for the creation of an appropriate legal framework for social and employment policy for the "collaborative economy". It must encompass safeguarding

of **minimum standards in new modes of working**, for example crowdworking models and unstable working conditions, the negative effects of workplaces and marked differences in income as well as the increasingly difficult access to social security. The personal data of wage earners must be protected. Studies on an employment strategy must include wage earners and their stakeholders. **Legal uncertainties for consumers** must be analysed and eliminated. The BAK calls on the Commission to examine how a competitive environment can be created where consumers will find a greater and more diverse selection, with local suppliers involved, instead of a high corporate concentration and quasi monopolies. Regarding **online platforms, minimum standards** must be determined, for example with regard to the rights and obligations of users, the scope of liability of operators, provision for risks in the event of damage or loss and specific data protection provisions.

**Promotion of SMEs and start-up companies:** The BAK decidedly rejects the endeavour to make more risk capital accessible in a shorter time. The "second chance" project should include debtors affected by bankruptcy. The proposal for the *societas unius personae* (SUP - single-member company) is highly susceptible to misuse and therefore must be rejected.

**Regulation of liberal professions:** The BAK has always been in favour of reducing over-regulation while ensuring that a high level of quality is maintained.

**Services passport:** The proposed passport is also intended to include workers posted abroad. However, cases of misuse occur repeatedly in this particular area. Therefore the BAK rejects the inclusion of information requirements regarding the Posted Workers Directive. There remain many open questions regarding this passport; therefore BAK views this project with scepticism.

The **dismantling of barriers in the retail sector** may not be made at the expense of the rights of employees.

**Geo-blocking:** Measures against unjustified geo-blocking are welcomed by the BAK. This applies in particular to the refusal of access to websites based on the nationality of the consumer or their geographical Internet address. The practice of routing consumers to a local site with higher prices in the main is also rejected by the BAK.

The BAK is against the **expansion of the standards system** to include environmental, health and service standards. In terms of democracy this creates a growing problem in that those affected by the standardisation process (employees, consumers, SMEs) are increasingly excluded from the formulation process for standards.

The BAK considers the proposal for **public procurement** deserves to be supported. Bidders who present unfair calculations often win these tenders. The "best bidder" principle must be enforced; employment, social and environmental criteria must be taken into consideration more.

**Intellectual property:** A revision of supplementary protection certificates (applies to medicines, for example) should consider the public interest more than was the case previously. Regarding copyright, care should be taken to ensure that private users are not included in the proposed rules for commercial violators of copyright.

The BAK rejects a reform of the information procedure for the **Services Directive** where services exempted from the scope of application of the directive (e.g. services of general interest) are indirectly subject to pressure for liberalisation. Instead the BAK calls for a legal framework for the service sector leading to an expansion of employment and social standards.

In the revision process for the **Mutual Recognition Regulation**, the Commission is proposing self-declaration by companies for legally bringing products into the market. The BAK is against this proposal because it can bring significant disadvantages and risks to consumers as well as competitors.

## The AK's position in detail

Currently the European Union has a series of challenges it must overcome:

- the consequences of the financial crisis, which began in 2008, have not yet been fully overcome. **GDP** as at 2014 (and also for 2015 according to the forecast) remains **below the level of 2008 in several EU member states**.<sup>1</sup>
- In the euro area in particular, unemployment remains disturbingly high; in September 2015 it was around 10.8% or **17.323 million unemployed people (EU-28: 22.831 million)**. In comparison this is almost 5.4 million more unemployed (EU-28: around 6.1 million) than immediately before the financial crisis of 2008.
- Around 120 million people are at risk of **poverty** in the EU: this is **around one quarter of the population of the EU**.<sup>2</sup> This means the situation has worsened considerably compared to before the financial crisis.
- The **wage share** (i.e. the share of national income accounted for by wages) in the EU has experienced a negative trend in recent decades: Over the last 40 years in the EU-15 **it dropped from 72.8% in 1975 to around 64 % in 2014**.<sup>3</sup>
- **Economic growth** in particular reveals **how far behind the European Union** is lagging compared to other economic areas such as the

USA. The economy at EU level is forecast to grow by 1.5% this year. In contrast, 2.4% is forecast in the USA for the same period and 3.1% for the global economy.<sup>4</sup>

- The debt-to-GDP ratio in the euro area reached 94.5% at the end of 2014 (EU-28: 88.6%), whereas the figure for 2008 was only 64.9% (EU-28: 57.8%).

Even the President of the European Commission, Jean-Claude Juncker, talks openly of the fact that the European Union is not in a good state in an appraisal of the overall situation of the European Union.<sup>5</sup> The numerous unresolved issues which the European Union is currently battling with shows that the EU policies pursued in recent years have widely missed the mark regarding their objectives.

This is probably due primarily to the fact that EU policy in recent decades has been oriented to a large extent to the wishes of the corporate sector, while ignoring all other interests.<sup>6</sup> With its policies the EU has brought about a contest to create the lowest standards in areas such as labour and social legislation, as well as consumer and environmental protection. Thus it has contributed actively to a distortion of competition in the Single Market. It is clear that **a new course must be set regarding the Single Market Policy**. Only with a policy with direct and perceptible added value for the most **important drivers of the Single Market, namely employees, consumers** and small and medium

sized enterprises, does it appear possible to take that important step out of the existential crisis of the European Union. One thing has become clear in any event: a policy almost exclusively oriented to the interests of large corporations is not capable of attaining the **objectives defined in the EU Treaty** such as to **“promote the well-being of its peoples”** and a **social market economy** aiming at **full employment and social progress**. This is shown all too clearly by the results of the EU Single Market Policy pursued hitherto and oriented almost exclusively to the corporate or supply sector.

We have taken the liberty of presenting the following comments on the individual chapters of the announcement by the Commission on the Single Market Policy:

### Chapter 1: Upgrading the Single Market

Although the Commission refers to additional “opportunities for people” in its announcement, the interests of the **230 million workers** in Europe in particular are almost completely **dismissed**. The communication refers only in the introduction to the high level of unemployment across the EU, but without presenting specific steps and measures that could help those seeking work to find new employment. The communication concentrates mainly on measures that benefit businesses, although the Commission is anxious to emphasise the role played by consumers. Ignoring those in employment or seeking work is one-sided and unacceptable. This will not bring about the urgently needed boost to economic growth via the Single Market.

For example, the Commission talks about its strategy for a digital Single Market, presented in May and concentrates on consumer and companies issues. The fact that digitisation of the Single Market will be accompanied by **major changes to the working environment** is largely ignored by the Commission.

### Labour Mobility Package

A **Labour Mobility Package** has been announced which is intended to ensure greater mobility of labour. The fact is that **by far the largest percentage of labour mobility takes place from Member States with low wages to Member States with higher wages**. Mobility depends only in a very small part on the qualification of workers which cannot be met in the target country. Furthermore, data<sup>7</sup> clearly support the fact that **wage and social dumping is the main reason for cross-border posting of workers**. Therefore, before measures aiming at higher mobility of labour are considered, we should ensure that the posting of workers does not lead to wage and social dumping and crowding out practices in the labour market. The **problem of pseudo posting of workers** (misuse through bogus AI posting notifications) is of primary importance here as well as the problem of differing bases for the assessment for social security contributions. The latter, for example, results in companies with cross-border activities being handed a legal economic advantage which virtually invites social dumping. Just how problematic endorsements, certificates or similar issued by authorities or public offices can be is shown by experience with pseudo postings, i.e. misuse through bogus AI notifications. Such malversation, which has been known

for years, has not been effectively combated to date. Again, the issuance of a **services passport** or similar should only be considered when a practicable solution has been found to resolve the problem of pseudo postings.

The BAK calls on the Commission to take measures that prevent the current downward trend in wage and social competition. The principle of “the same work in the same place is rewarded by the same pay and working conditions” must be adhered to. Furthermore, a non-regression clause is conceivable, whereby EU measures may not result in a regression at national labour law. Furthermore, the BAK expressly demands autonomy of social partners and calls for the protection and strengthening of basic social and trade union rights, which have been partly called into question by decisions of the ECJ on the cases of Viking and Laval.

#### **Creation of tax equity**

The Federal Chamber of Labour welcomes the intention of the Commission to ensure equity is created expressly regarding taxes. It should no longer be possible for companies to **misuse** differences in national tax systems in order to avoid paying taxes **as part of aggressive tax planning**. Possible tax loopholes should be considered which can occur with new business models, for example in the “collaborative economy”. In order to establish tax equity **the BAK calls for** the introduction of a **common corporation tax base** with a **minimum corporate tax rate** and **mandatory country-by-country reporting**. This is the only way to ensure that taxes are paid in the country where the company is active commercially.

#### **Strengthening the industrial base**

**An industrial base is an important prerequisite** for sustained growth. Industry should continue to make an important contribution to more employment, well-being and quality of life in the future. This requires an active industrial policy. It is precisely at the very important **European level that setting false priorities** like austerity, deregulation and flexibilisation neglects to give important incentives to create confidence in an economic recovery and hence public and private investments. A **U-turn** should be attempted.

#### **Protection for people**

The first chapter states that revitalisation and modernisation provides appropriate **protection for people**. New opportunities are to be created for consumers, workers and companies. However, this thought is **not pursued in the rest of the document** with regard to protection for people or opportunities for workers. An extension of the Single Market in particular, which is accompanied by increasing flexibility and deregulation in many areas, requires careful consideration as to how the rights of workers can be secured and working conditions improved. Therefore this announcement must be supplemented by these aspects as a matter of urgency.

## Chapter 2: Creating opportunities for consumers and businesses

### Enabling the balanced development of the “collaborative economy”

As the Commission rightly notes, the collaborative economy, where on-demand services are available and goods can be used via online exchange platforms, is subject to rapid change. Especially people in the labour market and consumers are affected massively by these changes. Examples such as Amazon and various crowdworking models clearly show that workers’ rights are already being eroded and co-determination restricted.

#### Employment aspects:

As Art. 145 of the TFEU states, it is the task of the Union and its Member States as part of the development of a coordinated employment strategy to work towards the ability of labour markets to satisfy the requirements of economic change. This is intended to achieve the aims of Art. 3 of the EU Treaty, for example the promotion of well-being of its peoples, a competitive social market economy aiming at full employment and social progress.

In its remarks on the collaborative economy, the Commission talks of the effects of digitisation on labour markets and workers: According to the above, new jobs will be created, workers will have more flexibility (according to the Commission the range stretches from unqualified micro jobs to working as a parttime entrepreneur); however, complaints have been voiced that workers’ protection, social insurance and health and safety standards have not been clearly regulated. A clear regulatory environment must be created in order to protect workers.

However, specific measures in the field of employment are not addressed in the communication. From the point of view of the **BAK** the following elements must be integrated in a **coordinated employment strategy** to create an appropriate legal framework for the collaborative economy:

- the risks and negative **effects** accompanying digitisation **on the labour market and the employment system**. This applies to the increase in unstable employment contracts and, associated with that, the increasing difficulty of procuring access to social security systems (health insurance, pension, unemployment benefit) as well as growing differences in income for ever increasing groups of workers. **Measures** to counteract this must be incorporated in the Single Market Strategy (qualification, reduction in the working week, analysis of the effects on employment in individual sectors, etc.).
- **Securing minimum standards in new types of work** which accompany the cited increasing instability and a permanent tightrope walk between employed and freelance occupations. Efforts must be made to extend the concept of the worker in order to accommodate these trends. Crowdworkers, for example, formally work as freelancers; in fact they are dependent on a few companies and hence satisfy the preconditions of employed persons. Means must be found to offer these people security both in terms of labour and social legislation.

- **Protection of workers' personal data** and corresponding minimum European standards with an "escape clause" which allows these standards to be exceeded.
- Improvement of the **enforcement of rights** of employed workers, which are complicated even more in cross-border employment contracts (for example the question of which law is applicable when services are provided via the Internet).
- The communication mentions plans for cross-sectoral studies where the Commission will take care of the active incorporation of market players, consumers and authorities. What is missing is the explicit **incorporation of workers and the bodies representing their interests**.
- Furthermore, it must be ensured that even with a shift in the value chain, the **winners of digitisation** make a **fair contribution** towards safeguarding future social systems in Europe. Also in order to prevent European social systems from being eroded as a result.

#### **Consumer aspects:**

In Chapter 2.1 the European Commission refers to the fact that new collaborative business models will not remain without consequences for current markets. There is legal uncertainty as to how the relevant consumer protection regulations are to be applied to new forms of on-demand services and online exchange platforms. We agree with this statement. However, it must also be said that this development must be examined not only with regard to a distortion of competition between traditional and

new forms of services. **Satisfying consumers' need for protection must be a regulatory dictum for the European Commission.**

Platforms reduce search and transaction costs for participants and make it easier to exchange goods and services, agree utilisation rights and also to acquire certain goods and services. Easier matching of suitable offers and providers (comparison, assignment, combination) will undoubtedly provide consumers with a partial advantage in terms of information, a wider range of choice and the opportunity to negotiate customised solutions away from high-volume business practices. The Sharing Economy can of course help to preserve resources and improve the participation of some population strata.

However, we cannot agree unreservedly to the plan of the European Commission to take legal uncertainty in relation to new forms of services as the reason to scrutinise the dense network of regulations for services provided in a traditional manner. The majority of traditional regulations aim at ensuring a high quality of service. This remains a highly topical approach because it satisfies the need of consumers for preventive protection against shortcomings in services or damages or loss.

**The BAK** calls for the current **legal uncertainties for consumers to be analysed** and, if necessary, to be resolved **through clarifications and supplements** to the legal framework of consumer rights. The aim of the investigation should be to ensure a very high quality of services independent of how their access and provision (electronically or traditionally) is organised.

However, in the most prominent commercial examples of these platforms a **tendency to very high market shares** (Uber, AirBnB) has emerged within a very short time after their introduction to the market. The relative dominance of platform providers benefits - as with the globally oriented Internet companies **Amazon, Facebook, Google and Apple** – a corporate policy which systematically flouts compliance with the legal framework (which applies outside the country where the provider is domiciled) and rapidly pushes alternative providers from the market (at best into niche markets). This **disregard for legal regulations** affects not only **consumer** and data protection rules, but also **working conditions and remuneration**. Platform providers can hence obtain an unfair competitive advantage which makes it difficult for other providers to establish themselves in the same sector. The collective wishes of consumers in local markets are often ignored by the platforms if they do not fit into the global corporate concept.

**In the opinion of the BAK**, the Commission must **examine** how a **competitive environment** can be created where **consumers** will find a **greater and more diverse selection** in comparable services, and **local suppliers**, whose business is not globally oriented, will have a chance in the market instead of a **high corporate concentration** and quasi monopolies.

In the case of pan-European violations or legal evasion of providers, the EU Commission should push through competitive processes and possible informal settlement processes in order to protect the rights of workers, consumers and other public interests.

Therefore the **BAK welcomes** the announcement of the European Commission that it will provide more details of **how far the provisions of the Services Directive, the e-Commerce Directive and European consumer protection rules** are to be **applied to the collaborative economy** or whether there is a need for further regulation. With the advance of peer-to-peer platforms, retailers and mediators (in general middlemen between manufacturers, wholesalers and consumers) are to some extent bypassed; hitherto they had been contractually responsible vis-à-vis consumers for compliance with the promised object of the agreement, to a relatively well defined extent.

In a conflict situation this means a lack of protection for consumers vis-à-vis platform operators, who often see themselves as purely IT service providers (hosting providers) without a close connection to the offers of third parties placed on the platform. Individual offers are often made by private persons or very small commercial providers who, in the case of a dispute, especially across borders, are often difficult to locate and be held to account.

The need for **additional minimum regulation** includes, from the consumer's perspective, the determination

- which mutual **rights and responsibilities users** of peering and sharing platforms have;
- responsibilities and **scope of liability** of the platform operator, e.g.
  - in relation to the offers placed on the platform by private or commercial third parties;

- the scope of pre-inspection of compliance with the legal framework of trade, consumer or labour laws by participants before placing an offer;
- legal information for private participants without knowledge of the law, e.g. of their obligations under trade law;
- minimum measures which the platform operator must take against abusive practices, such as the identification of participants, the removal of clearly illegal offers and mediation in disputes;
- obligations of the platform operator regarding **provision for risks in the case of loss or damage** to users of the platform, for example escrow-based solutions or insurance;
- **differentiation between platform participants** who are active privately or commercially, using objective attributes that are as specific as possible;
- the **obligation of platform providers** to make the status (private or commercial) of participants in the platform readily identifiable and also to verify the accuracy (through random checks and when complaints are made);
- provision of **information on applicable law** in a clear and understandable way;
- where necessary, **specific data protection regulations** which allow for the right of approval by participants, the principle of close association regarding data utilisation and the principle of data economy:
  - It should be noted above all that platforms are commercialising long-standing, traditional forms of social interaction (flea markets, neighbourly help, educational exchanges, etc.).
  - The personal communication data resulting from the exchange between participants should be protected disproportionately better than before against commercial exploitation.
  - Privacy by design settings should allow participants to choose freely whether they would like to make their communications (comments, evaluations, etc.) public or only to selected participants.
  - Furthermore, participants must be able to prohibit behaviour profiles and marketing evaluation of their communications without this causing them to be excluded from using the platform.
- how the future right to **portability of data** is to be implemented in the practice of platforms

### Promoting SMEs and start-up companies

Plans to strengthen small and medium sized enterprises are basically to be welcomed. However, some of the proposed measures must be scrutinised, while some are not acceptable:

- The proposals to **promote start-up companies** must be **differentiated**. Deliberations to improve legal certainty for SMEs and create appropriate contact points for advice are welcome. However, the **proposals for financing** are **very problematic**. Particularly in light of the statistics on personal bankruptcy in Austria, **the BAK decidedly rejects the intention to make more risk capital available in a shorter time**. Failed self-employment is a frequent reason for over-indebtedness; therefore the verification process in advance should be intensified instead of introducing further facilitation. Furthermore, many start-ups do not achieve an income that ensures a living wage in the medium term, as evaluations of founder programmes in Austria have shown. This aspect is completely missing from the announcement. Current options for financing are sufficient and should not be expanded.
- **Projects to give a second chance** should **consider** sufficiently the livelihood of **debtors** as well as **those affected by bankruptcies** and should not promote the formation of new companies in a completely one-sided fashion.
- The Commission continues to insist that its proposal on **single-member companies – societas unius personae (SUPs)** – should be accepted immediately by the legislative powers. The BAK would like to note that the SUP proposal is **highly disputed** both in the **European Parliament** as well as in **Member States** (Germany, Austria, Sweden, Belgium, Spain have all indicated their rejection). No decision has yet been taken by the European Parliament. The **BAK** is also strictly against the **draft SUP directive**. It is not a suitable instrument to boost the Single Market. On the contrary: The draft SUP directive would essentially allow any person (both physical and legal) to found a limited liability company de facto **without minimum capital, without personal control** of the founder, **without observing the unity of the registered office according to the statutes and the place of effective management** and de facto **without any guidelines as to its internal organisation** and for this company to be active without restriction throughout the whole Union independent of the place it is registered.

The BAK sees SUPs posing a great risk of a massive increase in **corporate fraud**, other **criminal activities** (for example money laundering) or **pseudo freelancing**. **Wage and social dumping** is inevitable if this draft proposal is implemented. The weakest members in the labour market would bear the negative consequences. Furthermore, multinational groups (an SUP has no limitation as to size) would gain

enormous scope for configuring their activities through the possibility of separating their official office according to the statutes and the actual place of management, especially at the expense of co-determination. **Therefore the BAK rejects the call of the Commission for immediate acceptance of the draft proposal.**

- The **“Think Small First”** principle formulated under **REFIT** shows that the **European Commission** has still **not learnt from its mistakes**. Because **from the start** of working towards a common European Single Market **economic interests have always been at the centre**. Consequently a series of erroneous decisions at the level of the European Union, especially in the financial sector, have resulted in the fact that the EU has still not fully recovered from the financial crisis. Real simplification of bureaucracy would be welcome on a **REFIT** platform, whereby the interests of all stakeholders must be considered equally. **REFIT measures** implemented by the Commission, such as the decision on legislative proposals for illnesses of the musculoskeletal system, passive smoking, carcinogens as well as the hairdressing sector (despite the agreement achieved at the level of social partners) **must be rejected just as much** as the possible **lowering of worker and consumer standards** through simplification or abolition of legislative acts.

### **Single Market without borders for the exchange of services**

The chapter on the “Single Market without borders for the exchange of services” only addresses, in a one-sided fashion, the advantages of further deregulation of the service sector. For **consumers** it is not only the price of a service that is decisive, it is also the quality. The aspect of **quality assurance** should also be considered.

### **Regulation of liberal professions**

The European Commission proposes various evaluation measures with the aim of identifying **over-regulation, especially with regard to the liberal professions** and presenting proposals for their abolition. Furthermore, a legislative initiative for providers of cross-border services, especially in construction and corporate services, is proposed. **The BAK was always in favour of a reduction in over-regulation** (e.g. over-long training programmes compared across the EU) in order to give young people easier access to the market after education/training, always with regard to **maintaining a high level of quality** of services (e.g. compensation of long training periods through an obligation to attend regular further training). Regarding liberal professions, which offer their services as part of services of general interest (e.g. pharmacies), a nationwide coverage for the whole population must also be ensured. From the perspective of consumers it must be said that national restrictions in Austria, which represent safety regulations and standards primarily in the interest of consumers, must be retained in the future. Lowering standards is not acceptable.

### Services passport

The European Commission wishes to use the services passport so that companies do not have to reproduce statutory information already provided in the country of origin in the destination country. The proposed **passport is also intended to include workers posted abroad**. However, it must be said that **cases of misuse continue to occur**, especially regarding posted workers. **Pseudoposting of workers** has been observed, as well as cases of **wage and social dumping**. Therefore the **BAK rejects** the notion that information required under the **Posted Workers Directive** should be covered by a **services passport**.

However, **further questions** are linked to the proposal for a services passport: The authorities of the country of origin are required de facto to have available an expert's report on the legal standards of the destination country. However, authorities cannot be expected to know about all the information requirements of the destination country. Furthermore, the question must be asked which authority is to check whether the prerequisites which apply to the service provider are still satisfied - should this be the country of origin or of destination? How long will a services passport be valid: will it have to be renewed every year, once every ten years or never? The **BAK is very sceptic concerning the services passport** because of the many unanswered questions and is hoping for a satisfactory response to the questions raised in the proposal of the Commission, announced for 2016.

### Addressing restrictions in the retail sector

The interests of consumers and above all workers must be discussed in the Chapter "Addressing restrictions in the retail sector". The dismantling of restrictions on operations of retailers **may not** lead concomitantly to the **dismantling of workers' rights**. As was stated above all in Chapter 2.1 on the collaborative economy, this trend can be observed in online trading in particular.

Furthermore, the announcement should also provide information on how workers can be supported so as to keep up with the latest developments. Better access to **qualification schemes**, especially professional qualifications, should be promoted in parallel. Instruments such as the structural fund (especially the European Social Fund) can make a contribution in this case. However, effective utilisation of structural funds is at risk due to the excessive rules of the European Commission on processing and accounting. The European Commission must simplify processes so that funds can be used in a targeted and timely manner.

### Geo-blocking: Preventing consumer discrimination

The **BAK essentially welcomes** the proposal of the Commission to implement **measures against unjustified geo-blocking** and other forms of consumer discrimination due to their place of residence. This refers to online service providers who refuse users access to a website or purchasing opportunities on a website according to the nationality of the consumer or their geographic Internet address. The practice of **routing consumers to a local site with higher prices** in the main raises at least the suspicion

of unjustified geo-blocking. These unfair practices are not infrequently based on agreements on splitting markets, according to the European Commission in its announcement on the digital Single Market from May 2015.

However, more specific details are required as to which of current practices are (un)justified. Price discrimination through online dealers according to the location from which a consumer accesses an Internet site is mentioned.

It remains open in how far massive **differences in spending power** in the different countries (for example between Spain and Germany/Austria) can justify **different pricing**. The question also remains open on how the practice of audiovisual media providers in general and of public service broadcasters in particular is to be classified, with regard to acquiring national broadcasting rights only due to understandable cost reasons and excluding interested parties in other countries from consumption of the contents broadcast or streamed via the Internet by applying basic encryption. Nor may consumers call up media centres when travelling abroad for copyright reasons.

The target group for obligations deriving from the Services Directive cannot be the media providers for the reasons mentioned above, who are legally obligated to territorial restrictions by reason of copyright. **Therefore, the BAK calls on the Commission to examine** to what extent large **licensors** (such as US film producers or owners of sports rights) **can be brought to abandon restrictive territorial clauses** and high dissemination costs outside the core transmission area to the benefit of consumers.

However, price discrimination is not restricted simply to consumers according to their country of origin and their need for cross-border consumption with the same conditions, but also extends to certain consumer groups and even to individual consumers. Dynamic electronic pricing via the Internet offers the possibility of assigning each interested party an individual price based on their previous Internet user profile.

The first signs are already apparent: suspicion reigns that online platforms are adapting prices according to the mobile or desktop PC the order was made from (the higher the value the end device, the higher the price may be which the ordering party will accept). Such practices are non-transparent, manipulative, discriminatory and therefore highly questionable in terms of laws on competition.

**Therefore the BAK calls for types of behaviour** such as individual adaptation of prices according to consumer profiles and scoring methods for assessing creditworthiness to be **regulated to the benefit of consumers**. **The Services Directive should therefore be extended to include transparency regulations** (duty of the service provider to provide information why, according to which criteria and with which consequences they differentiate between consumers) and also be applied to cases of domestic discrimination without reference to the Single Market.

### Chapter 3: Encouraging modernisation and innovation

#### Modernisation of the standards system

In the opinion of the BAK it is a **highly questionable course of action** to take **a study of the British Standards Institute** as proof for the success of standardisation. Since standards institutes generally live off licence fees for their standards, a study commissioned by the “market dominator” has little significance. **In the opinion of the BAK the extension of required standardisation** beyond primarily technical standardisation to include environmental, health and service standards must be **rejected** both for democratic as well as economic considerations.

In terms of economic policy, the result of the British study must be scrutinised particularly because **standardisation by private bodies is a question of feasibility**. Participation in technical committees is firstly subject to fees and secondly requires a great deal of time. SMEs are increasingly being pushed out of the standardisation process, which is used primarily to standardise products and services as offered by large corporations who are the market leaders. Hence standardisation is used increasingly as an instrument of market foreclosure. Therefore, the regulatory activity of private companies results in inefficiency: as illustrated by **social housing schemes**. The more technical the measures and requirements that are needed, the higher the costs. Rising prices through standardisation can therefore have a positive effect for certain companies, but a **negative** effect for the **awarding company affected in the field of social housing**. A compromise must be found to this ambivalence

between technical necessity and the socially relevant social impact, a compromise that is not guaranteed by the largely non-transparent and undemocratic process of national and European standards committees.

This results in various problems in terms of democracy: The standardisation process does not necessarily have to include those parties affected by the standard. **Not only SMEs** are increasingly excluded, but also **workers and consumers** who are affected. They are not only excluded from setting standards, but also from the formulation process. A standard is considered to be the intellectual creation of the standards institute and is protected by copyright. Access to the standard is often subject to **high licence fees**. The thought that parties subject to a standard have to pay money to the state for legal access is absurd. This problem is not questioned in the field of private standardisation.

In the end standards achieve de facto mandatory character via court decisions. A regulation is needed both at European as well as at national level to clarify that standards, unless they have been declared mandatory by law or decree, are not binding. Nor do they represent an expert opinion. In cases before administrative authorities and courts of law, state-of-the-art can be proved by other means than compliance with standards. The new EU directive on general public procurement law, for example, contains a comparable provision regarding “labels”.

**In the opinion of the BAK new criteria must be set** in order to modernise the current partnership, as expressed in the Single Market Strategy. Legitimation of

decision-makers and decision-making processes in the standards world is required as well as the corresponding development of the legal form and procedures of national and European standards institutes. This **spate of standards must not be allowed to proliferate further**. This requires a European and national standards strategy in advance, with all stakeholders included in its formulation as well as the pertinent parliament. Otherwise the trust of consumers and of companies in standards will continue to decrease.

#### Public procurement

The **BAK shares the concerns of the European Commission** regarding the lack of useful empirical data on actual costs of the public procurement.

A weak point concerning the efficiency and transparency of public procurement is the lack of empirical records as to how far the complex and hence costly processes stipulated in public procurement rules actually achieve their orientation to targets as claimed. There are no statistical evaluations from which the actual costs are identified compared to the costs in the offer submitted by the best bidder. The BAK shares the opinion of the European Commission that **the agreed costs are in fact not adhered to**; they are regularly exceeded to a significant extent (not only in projects such as the Berlin airport, Skylink terminal at Vienna airport or the Stuttgart rail station). One of the causes is that costs are lowered in the offer through wage dumping, the use of subcontractors, etc. This means that **bidders who often submit dishonest calculations** are awarded the contract by accepting follow-up costs which by far exceed the price of the

second or third best bidder. Ultimately these **follow-up costs must be borne by the taxpayer**. This means the procurement process is inefficient despite or in fact due to its complexity. Therefore the BAK calls for the best bidder principle to be promoted where employment, social and environmental criteria are considered.

In order to be able to apply legal pressure, in the opinion of the BAK a centralised statistical **compilation of the best price and the actual costs at the end of each public procurement project** is urgently required. Establishing a central register of contracts would be a first step. Such registers exist in a few Member States only, but not in Austria. Therefore, in our opinion the **proposal of the European Commission** on this matter **should be supported**.

However, the BAK believes that **there should be no intervention in the national judiciary** by establishing additional administrative inspection authorities. This would make a very complex process even more difficult. However, establishing **mediation boards** to decide in advance disputes regarding tender documentation would be a **sensible and cost-efficient way** of avoiding court cases.

#### Framework for intellectual property rights

The European Commission is proposing to create a standard title for **supplementary protection certificates** (applies to medicinal products, etc.). A revision of supplementary protection certificates should consider the public interest more than was the case previously.

Administrative approval processes reduce the actual protection given by a patent due to the time between submission of a patent application for a new medicinal product and approval for bringing the patented medicinal product into the market. A protection certificate lengthens protection by patent. It is intended to promote research in the pharmaceutical sector. At the same time all interests concerned, including **public health**, should be **considered** in the pharmaceutical sector (cf. Regulation (EC) 469/2009 of 6 May 2009 concerning the supplementary protection for medicinal products). For example, in future it should be stipulated that supplementary protection certificates can only be issued to the holders of basic patents or their legal successors who can prove that their research costs have not yet been amortised for the product.

Regarding **copyright** the European Commission appears to concentrate primarily on the assertion of legal rights with their planned measures. **The wording** of the measures presented is geared primarily to **stricter rules for "commercial" violators** ("follow the money" principle). Here clarification is needed for the term "commercial" which currently enjoys a very wide interpretation at EU level: **Private users** should expressly and clearly **no longer be included** in this definition. How far the "follow the money" principle can be supported as such from the viewpoint of consumers and users can only be evaluated when the specific proposal is presented by the Commission.

Essentially copyright law (Directive 2001/29/EC on copyright in the information society) in connection with a digital environment requires a much

more ambitious reform than hitherto mooted by the European Commission. Hence a new, modern reconciliation of interests must be created: the interests of users must be considered more than before - while maintaining a fair claim for compensation by the holders of rights based on damage or loss suffered - (legal certainty when using work, safeguarding access to works and information in the digital society, Internet access, protection of basic rights such as data protection and privacy).

#### Chapter 4: Ensuring practical delivery

##### Delivery of the Services Directive by reforming the notification procedure

The Commission wishes to revise the notification procedure for regulatory measures implemented at a national level in the services sector. The reason, according to the Commission, is that there is no in-depth evaluation for the proportionality of regulatory measures laid down in the current legal framework. According to the intention of the Commission, the notification procedure is also to be particularly applied to services which currently are not covered by this directive. Furthermore, measures not notified by Member States should be considered invalid.

The **BAK decidedly rejects** this proposal of the Commission. A reform of the notification procedure may not be **misused in order to indirectly subject services, such as those in the general interest (public services)**, which are exempted from the scope of application of the Services Directives in accordance with Art. 2 (2) of the Services Directive, **to pressure for liberalisation via a new notification procedure.**

Instead **the BAK proposes that a legal framework be developed** which allows **employment and social standards** in the service sector to be **maintained and expanded** as defined by Art. 3 of the EU Treaty (promotion of social progress and well-being of workers).

#### **Mutual recognition and presumption of conformity of products**

The Commission is planning to revise the directive on **mutual recognition**. It hopes to ensure standardisation of documents which must be submitted as proof in order to legally bring a product into circulation in a Member State. Traders should be given the opportunity to issue a **self-declaration on legally bringing a product into circulation** (presumption of conformity) in another Member State. The **BAK is decidedly against this proposal**. A self-declaration could lead to the **percentage of non-compliant products increasing even further** in the EU. As the Commission itself states, the percentage of fully compliant products is already very low, within the range of 28 to 56%, while the number of illegal and non-compliant products continues to rise. According to the Commission, many companies violate regulations due to ignorance or they hope to obtain a competitive advantage. Therefore the idea of introducing a **self-declaration** can only be described as **counter-productive**. Non-compliant products can mean **a high risk (to health) for consumers**, and can also be damaging to competitors who offer comparable compliant products in the marketplace. Therefore the BAK calls on the Commission to implement measures that ensure that the **percentage of non-compliant products** in the Single Market is **reduced to a minimum**. A product conformity initiative

can be a starting point; however, the BAK cannot carry out an actual evaluation of this initiative due to the lack of details. However, the introduction of a self-declaration is definitely not suitable to achieve this goal.

#### **Concluding remarks**

It is apparent that the Single Market Policy pursued by the Commission hitherto was not successful. Instead of a flourishing economy with rising wealth for the population the **economic policy** of the European Union **oriented solely to supply has brought us recession and stagnation in recent years**. The focus of the EU on exports as a possible motor for economic growth has scarcely brought any success. In this context it is appropriate to scrutinise the free trade policy hitherto and to carry out an impact assessment of the ongoing negotiations for trade agreements such as TTIP, CETA and TiSA.

For the BAK it is certain that only by shifting away from the previous Single Market Strategy towards a policy oriented to **strengthening purchasing power** can bring an **upswing in the Single Market** and hence economic growth.

## Footnotes

<sup>1</sup> According to data from the AMECO database, DG ECFIN, European Commission, [http://ec.europa.eu/economy\\_finance/ameco/user/serie/ResultSerie.cfm](http://ec.europa.eu/economy_finance/ameco/user/serie/ResultSerie.cfm), accessed on 26 November 2015

<sup>2</sup> <http://ec.europa.eu/social/main.jsp?catId=751&langId=de>, accessed on 26 November 2015

<sup>3</sup> According to data from the AMECO database, DG ECFIN, European Commission, [http://ec.europa.eu/economy\\_finance/ameco/user/serie/ResultSerie.cfm](http://ec.europa.eu/economy_finance/ameco/user/serie/ResultSerie.cfm), accessed on 9 December 2015; in the case of Germany the wage share for West Germany was given up to reunification.

<sup>4</sup> <http://orf.at/stories/2295925/>, accessed on 26 November 2015

<sup>5</sup> [http://ec.europa.eu/deutschland/press/pr\\_releases/13595\\_de.htm](http://ec.europa.eu/deutschland/press/pr_releases/13595_de.htm), accessed on 26 November 2015;

<sup>6</sup> See also the brochure of the Vienna Chamber of Labour on lobbying in Brussels, which criticises the dominance of corporations in the advisory boards of the European Commission.

<sup>7</sup> Pacolet, J and De Wispelaere, F, Posting of workers, Report on A1 portable documents issued in 2012 and 2013, Network Statistics FMSSFE, European Commission, December 2014

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