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AK Position Paper

Transparent and predictable working conditions in the European Union

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About us

The Austrian Federal Chamber of Labour is by law representing the interests of about 3.6 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 Transperency 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). 816.000 - amongst others unemployed, persons on maternity (paternity) leave, communityand military service - of the 3.6 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Rudi Kaske
President

Christoph Klein
Director

Executive Summary

- The Austrian Federal Chamber of Labour (AK) welcomes the fact that the European Commission has put the **objective of promoting secure and predictable working conditions** on the EU agenda.

- Extended requirements to provide information about essential aspects of the employment relationship and improved possibilities for workers to enforce their rights could contribute to **greater transparency about employment conditions.**

- The **minimum requirements** for working conditions that are set out in the proposed Directive are a step in the right direction. However, they **do not go far enough** in terms of guaranteeing adequately high levels of workers' rights and their scope can potentially be restricted by a number of exemptions.

- To achieve the objective of promoting secure and predictable working conditions, a **more comprehensive and more ambitious approach to improving the quality of work** is needed that aims to prohibit or cut back precarious employment.

- To achieve ambitious social goals, a **new social action programme**, including **mandatory minimum social standards with a high level of protection** – together with mandatory inclusion of the principle of non-regression – is required.

The AK's position in detail

General remarks

The submitted proposal for a Directive to replace the Written Statement Directive (Council Directive 91/533/EEC) aims to extend the **requirements for employers to provide information** about essential aspects of the employment relationship and to set out certain **material minimum requirements** to make working conditions more secure and predictable.

The AK welcomes the fact that the European Commission has put the **objective of promoting secure and predictable working conditions** on the EU agenda and has submitted a proposal for a respective Directive. Given the massive increase in atypical and precarious employment and the increasing flexibilization of labour markets, a large number of workers in the EU are affected by a lack of protection under labour law and access to social security, with far-reaching consequences for the working and living conditions of many people. In addition, we welcome the fact that the establishment of mandatory minimum standards to strengthen the rights of workers in the EU is to be put back on the agenda. Broadening the personal scope of the legislation, extending the requirements for information on the essential aspects of the employment relationship and improving the possibilities for workers to enforce their rights can help more workers to benefit from greater transparency about the conditions of employment applicable to them.

However, in order to actually make a substantial contribution to promoting secure and predictable employment and to improving living and working conditions – objectives which are set out in the proposed Directive – a far more **comprehensive and ambitious approach to improving the quality of work is needed.** It is therefore necessary to clearly set out the objectives of prohibiting or cutting back precarious forms of employment and preventing labour law and social law from being undermined to the detriment of workers with a low level of protection. This should be supported by a wide range of measures in the scope of a new social action programme of the EU, including the establishment of **mandatory minimum social standards with a high level of protection**, together with mandatory inclusion of the principle of non-regression. However, the Commission's approach seems to be aimed less at substantially cutting back precarious employment than at creating a partial legal framework to govern aspects of precarious work. In some cases, this entails the risk of implicitly legitimizing the existence of forms of precarious employment. The AK takes the view that the **material minimum standards** proposed generally **do not go nearly far enough** in terms of guaranteeing adequately high levels of workers' rights. Moreover, their scope can potentially be restricted by several exemptions.

The necessary comprehensive and ambitious approach to improving the quality of work also requires a **departure from one-sided labour market policy**

approaches. For instance, the significant increase in precarious employment is not only due to technological and demographic changes as suggested in the Explanatory Memorandum of the Directive. It is far more the case that the possibilities of precarious employment have been greatly increased by measures that take a one-sided supply-side labour market approach aimed at far-reaching liberalization and deregulation of labour markets. A systematic commitment to improving the quality of work in the EU therefore requires also a change of course in European economic and labour market policy, which must, inter alia, be reflected in the country-specific recommendations within the scope of the European Semester.

Specific remarks on the proposed Directive

Chapter I: General provisions

Art 1: Purpose, subject matter and scope

In Article 1(1), the phrase "while ensuring labour market adaptability" should be deleted since experiences to date show this phrase to be aimed at deregulation of the labour market, which is in conflict with an improvement in working conditions. Such improvement in working conditions is, however, the legal basis for the present proposal under Article 153(1)(b) and (2)(b) TFEU.

Under Article 1(3) of the proposed Directive, Member States are now only permitted to exempt employment relationships of up to eight hours per month, providing that a guaranteed amount of paid work is determined before the start of the employment, from the scope of the Directive. That provision is intended to replace the broader exemption from the scope of the preceding Directive. Although we support that extension in scope, nevertheless we recommend a **general deletion of the exemption** in the interest of the scope of the Directive being as broad as possible. That would also render paragraph 4 – which is problematic since it implicitly legitimizes the existence of zero-hour contracts – obsolete. The exemptions set out in paragraph 6 for natural persons belonging to a household where work is performed for that household should also be deleted.

Art 2: Definitions

Article 2(1)(a) sets out criteria to **define the status of workers** based on the case law of the CJEU (C-66/85 Lawrie-Blum; C-2016/15 Ruhrlandklinik). The aim is for the scope to be uniform among the Member States and to broaden the scope overall. We welcome that since it ensures that the proposed Directive also applies to workers who do not come under the scope of Council Directive 91/533/EEC, including workers in atypical forms of employment. We consider it particularly positive that, as a result, trainees may also come under the scope of the Directive.

Chapter II: Information on the employment relationship

Art 3: Obligation to provide information

Article 3 of the proposed Directive updates the minimum information requirements set out in Article 2 of Council Directive 91/533/EEC and adds a number of additional points. Since the points listed in paragraph 2 are minimum requirements, the phrase **"at least"** should be inserted into "The information referred to in paragraph 1 shall include", as in Article 6(1).

In the interest of transparency and improved information for workers, we welcome the extension of the mandatory list of points to be included in the document on the essential aspects of the employment relationship. We expressly welcome the obligation to inform workers of **arrangements for overtime and its remuneration** in advance (paragraph 2(k)). However, we are critical of the obligation to provide information about the **reference hours and days** within which workers may be required to work by their employer. In the interest of combatting precarious employment, on-demand work (in particular zero-hour contracts) should be prohibited under European law and should not be lent further legitimacy by an obligation to provide such information.

The information requirements concerning the document on the essential aspects of the employment relationship should also include information about **time limits for enforcing claims**, such as time limits for bringing an action and for expiry of claims. **Benefits in kind**, such as the private use of vehicles, should be listed. It has proven highly useful that the information specified in the Council Directive was extended in Austria upon transposition into national law to include: **"categorization, where applicable, into a general pay scheme".** If that information is lacking or no document on the essential aspects of the employment relationship has been issued, there is often a lack of clarity concerning the pay category and remuneration.

Art 4: Timing and means of information

The two-month deadline pursuant to Council Directive 91/533/EEC (Article 3) for providing a written declaration is to be shortened to no later than the first day of employment under the proposed Directive. In Austria, under Section 2(1) of the Employment Contract Law Act (AVRAG) and Section 1164a of the Austrian Civil Code (ABGB), the document on the essential aspects of the employment relationship (Dienstzettel) must be handed over to the worker immediately after the start of employment or work as an independent contractor. That rule has proved unsatisfactory for workers in many cases. If the worker receives the document on the essential aspects of the employment relationship only after his/her employment has already begun and the document does not reflect what was actually agreed and the worker does not raise any objections because he/she fears for his/her employment, in a later dispute that may be to his/her disadvantage due to the document serving as proof. In our opinion, it should be clarified in the Directive that the information given to the worker only represents a **notice** of the agreed employment conditions **by the employer and is not a declaration of acceptance by the worker**. Furthermore, the **deadline for presenting a written declaration** should be **at least one week before the start of employment** so that the worker has time to study the document and clarify any discrepancies with the employer. It is also important that the document on the essential aspects of the employment relationship – as under Council Directive 91/533/EEC – is handed to the employee and not merely provided.

Under paragraph 2, Member States are required to develop templates and models for the document on the essential aspects of the employment relationship. To ensure inclusion of the expertise of the social partners, it should be added that the templates should be

developed **together with the social partners.** Article 4 should be phrased so as to ensure that the **autonomy of the collective bargaining partners** with respect to the conclusion of collective agreements is not restricted in any way.

Art 5: Modification of the employment relationship

This paragraph should be unambiguously phrased to make clear that it is **not permitted** for the employer to **unilaterally modify** the essential aspects of the employment relationship that are relevant to the written information.

Art 6: Additional information for workers posted or sent abroad

The AK welcomes the additional requirements set out in Article 6 for employers to provide information if workers are posted abroad, updating Article 4 of Council Directive 91/533/EEC. However, in addition to the information specified, employers should also be required to provide the following information in the case of postings abroad: **exact place of work** in the target country, **arrangements for the possible lengthening or shortening** of the period of work, the **name of the line manager** who the worker reports to for the duration of the posting, the **working hours**, rules on **public holidays** and **tax and social security arrangements** during the period abroad.

The possibility set out in paragraph 3 for employers to fulfil certain information requirements by merely referencing the laws, regulations and administrative or statutory provisions or collective agreements governing those particular points in the target country is insufficient, since the scope of the information to be provided by the employer to workers may potentially be restricted as a result. The **exemption** set out in paragraph 4 for **postings of up to four weeks** should also be deleted since, in the interest of transparency, the necessary information should also be communicated for shorter postings.

Since these are minimum requirements, paragraph 2 should include the phrase **"at least"**, as in paragraph 1.

Chapter III: Minimum requirements relating to working conditions

Chapter III of the proposed Directive contains five Articles, which set out material minimum standards for working conditions. In addition to the specific remarks on the various Articles, we wish to note that the proposed minimum standards fall far short of the need for an **extension of mandatory minimum social standards** – including **mandatory inclusion of the principle of non-regression** – to combat precarious working conditions and, in general, to improve living and working conditions in the EU. There is need for action to determine mandatory minimum social standards for working conditions, for example in respect of a **prohibition of on-call work (especially zero-hour contracts), protection against involuntary relocation, protection of workers against unfair contract conditions and those which restrict mobility** and **continued remuneration** in the case of sickness, care for close relatives or other material reasons for workers' inability to carry out their duties. Furthermore, minimum standards are also needed with respect to the **quality of internships** and minimum rules for the **effective penalization of discrimination at the workplace**. A legal entitlement to **paid leave for education or training** and an obligation to provide a statutory right to a **minimum amount of professional**

further development during working hours could contribute significantly to the professional development of workers. In addition, the obligation of the employer to cover all **costs of workers for necessary expenses for work** could be enshrined in the Directive. Moreover, the discussion about possible **supplements to remuneration for precarious workers** and the obligation of the employer to offer a **standard employment contract**, if available, to atypically employed workers in the company should be set on the EU agenda.

For further suggestions on minimum social standards, please see the AK EUROPA position paper on the European Pillar of Social Rights dated December 2016 (http://www.akeuropa.eu/_includes/mods/akeu/docs/main_report_en_444.pdf) (p. 9 etseq.).

Art 7: Maximum duration of any probationary period

The term "probationary period" under the proposed Directive **needs to be defined**. If, as under Austrian law (see, for example, Section 19(2) of the Employees Act (AngG)), it is understood as a period in which the employment relationship can be terminated at any time, the minimum requirement that a probationary period must not exceed six months does not go nearly far enough in terms of guaranteeing adequately high levels of workers' rights. Under Austrian law, a probationary period may be agreed which must not exceed one month. A maximum probationary period of six months is also highly problematic for reasons of labour market policy. Such a long probationary period would be contrary to the objective of stable employment of people in the labour market. Moreover, would also facilitate the already widespread practice of companies passing the risk of fluctuating order levels onto the public (in particular via the unemployment insurance system) by rapidly terminating employment relationships and then re-employing workers. Furthermore, the very loosely phrased **exemption** in paragraph 2 is highly problematic, since it could potentially limit the scope of the provision considerably.

Art 8: Employment in parallel

Pursuant to Article 8(1), in general employers are not entitled to prohibit workers from taking up employment with other employers. Given that the Article is headed "Employment in parallel", it may be assumed that it concerns protection of workers against exclusivity or incompatibility clauses in relation to their current employment. We welcome this provision. In addition, however, the Article should **include a prohibition of post-contractual non-compete clauses**, which restrict workers when they are looking for a new job after their current employment has ended. Post-contractual non-compete clauses are always disadvantageous for workers because they significantly restrict the worker's choice of jobs and hinder his/her job search. The public purse then has to cover any costs of a longer job-seeking period (such as the cost of unemployment benefits). Furthermore, with respect to paragraph 2, it should be stipulated that employers are not permitted to lay down conditions of incompatibility unilaterally.

In view of the high level of "working poor" in the EU, the Commission should not limit its proposals merely to enabling workers to take on other jobs in parallel, but should instead promote **high-quality** and **fairly remunerated work** that does not require workers to work several jobs to cover the costs of living.

Art 9: Minimum predictability of work

Under Article 9 of the proposed Directive, in the case of a generally variable work schedule, workers can only be required to work if work takes place within predetermined hours/days and if they receive "reasonable advance notice" from their employer. However, the term **"reasonable advance notice"** and the criteria set out in the preamble provide far too much leeway.

For our criticism of the implied legitimization of on-call work, please see our remarks on Article 3. In Article 9 a general prohibition of **on-demand work (in particular zero-hour contracts)** should be stipulated.

For the purpose of ensuring predictable leisure time of workers and protection of workers against unpredictable and arbitrary arrangements of the employer, under Austrian law pursuant to Section 19c(2)(1)-(4) of the Working Hours Act (AZG), the employer can only **modify the pattern of standard working hours** if the following conditions are met: a) the modification is justified for **objective reasons** related to the type of work; b) the worker is informed of the pattern of the standard working hours for the respective week **at least two weeks in advance** (except in the case of exemptions specified in the Act); c) the modification is not in conflict with any **legitimate interests** of the worker; d) the modification is not in conflict with any **agreement**. We recommend inclusion of the aforementioned provisions instead of the unclear phrase "reasonable advance notice" to ensure that the minimum standard provides an appropriate level of protection.

Art 10: Transition to another form of employment

We generally welcome the Commission's intention of introducing a provision to promote transition to forms of employment with better working conditions. However, **entitlement to a written reply** to the request for a form of employment with more secure and more predictable working conditions in itself **does not go nearly far enough** to meet the challenge of combatting precarious employment and the objective set out in the proposed Directive of improving living and working conditions. In our opinion, a **legal entitlement** for the specified workers with relevant qualifications to **be offered such a job, if available**, could, for example, be included in the proposed Directive.

In addition, it would make sense to include a mandatory provision that **leased workers** who have been leased to the same company for six months must be employed as part of the **permanent workforce** of the company. We also reject the further restriction of the already weak entitlement set out in the proposed Directive as according to the proposal it will not be mandatory for the reply of the employer to be substantiated and an oral reply will be sufficient under certain conditions.

Art 11: Training

Under the proposed Directive, workers must be provided with any training free of charge that employers are required to provide under Union or national legislation or collective agreements. While we welcome this provision, **it does not go far enough**, in particular because it only refers to training that employers are required to provide. Given the major importance of training in terms of life-

long learning – in the context of continuing changes in the world of work and increasing digitization – we believe a more comprehensive approach is needed. In our opinion, the Article should also include the legal **entitlement of workers** to a **minimum amount of training within working hours**, e.g. at least equivalent to one week per year in the case of standard working hours. In addition, we recommend that **entitlement to paid educational/training leave** be included in the Directive.

Chapter IV: Collective agreements

Art 12: Collective agreements

Under Article 12, Member States may allow social partners to deviate from the minimum standards set out in Articles 7 to 11 in the scope of collective agreements, providing that the overall protection of workers is respected. We consider this provision to be problematic since it would allow for the **level of protection** provided by the minimum standards to be undercut. The proposed provision merely requires maintenance of the overall protection of workers as a condition and does not stipulate that the specific regulatory objectives must be met to the same degree by measures concerning the same subject of regulation. This cannot ensure that the level of protection offered by the individual minimum standards is not undermined, especially in countries with highly decentralized collective agreement systems and workers in a weak negotiating position.

Art 14: Legal presumption and early settlement mechanism

With respect to the rules set out in Article 14 for failure of the employer to fulfil his/her obligations to provide information, we principally reject that the legal effects of failure of the employer to comply with his/her obligations to provide information only take effect if the worker reports the omission to the employer and the employer fails to rectify the omission within 15 days. First, it should be ensured that the legal effects also take effect if **the worker has not actively reported the failure of the employer to fully comply with its obligations.** Moreover, in our opinion, the **possibilities for employers** to be allowed an extension of time until they have to inform workers of the essential aspects of the employment conditions should be deleted. These provisions render the obligation to provide information by no later than the first day of the employment relationship (Article 4) obsolete and (taking point (b) into consideration) in effect enable the deadline to be extended by up to 30 days.

In our view, it is problematic that, under Article 14, if information provided by the employer is incomplete, **Member States can choose** whether to apply the legal presumption rule (point (a)) or an administrative complaint procedure (point (b)). As a result, there would be entirely different means of legal redress in the various Member States against a breach of the information requirements set out in the Directive, leading to different levels of protection for workers. In our view, it should be **mandatory for all Member States to apply the legal presumption rule** set out under point (a). The term "favourable presumptions" needs to be **specified in more detail**. Here it would be necessary, inter alia, to set out a rule that in general all agreements that represent disadvantageous conditions for the worker compared to discretionary law must be included in the document on the essential aspects of the employment relationship, otherwise they will be ineffective.

Art 17: Protection from dismissal and burden of proof

The obligation set out in paragraph 2, for the employer to disclose the the grounds for dismissal on request already in an extra-judical dispute, if a worker considers that he/she has been dismissed on the grounds that he/she has exercized the rights provided for in the Directive, is new to Austrian law. It would make sense to combine this with a legally irrefutable presumption that the worker was dismissed on the grounds of exercizing such rights if the employer fails to provide information on the grounds for dismissal.

Chapter VI: Final provisions

Art 19: More favourable provisions

Paragraph 1 should not only ensure that this Directive does not serve to justify a reduction in the general level of protection already afforded to workers in the Member States. It should in addition also stipulate that it does not justify a reduction in the **level of protection in the specific regulatory fields** that come under the scope of the Directive. In addition, Member States should be required to **progressively improve the level of protection for workers in the regulatory fields** that come under the scope of the Directive.

Should you have any further questions
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