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AK Position Paper

Task Force for Subsidiarity, Proportionality and "Doing Less More Efficiently"

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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

The AK's position in detail

BAK is taking the liberty with this opinion of involving itself in the work of the Task Force for Subsidiarity, Proportionality and "Doing Less More Efficiently". According to the announcements made in the Government's programme, the Austrian Presidency of the Council is also planning to address this matter in detail.

Therefore, in the following we would like to make some general comments on the perception of the concept of subsidiarity. We will then name a few areas where the institutions of the European Union, including the Court of Justice of the European Union (CJEU), have, from a worker's point of view, intervened far too much in the individual country's scope for action. And, finally, we list some ongoing EU legislative proposals which, in our opinion, should not be pursued further from the point of view of subsidiarity.

1. General remarks

First of all we would like to emphasise that a closer discussion about the subject of subsidiarity from the point of view of an employee representative body – a few important overlaps notwithstanding – in many cases results in contrary results vis-à-vis the assessment of business associations. This illustrates once again that assessments from the perspective of "subsidiarity" appear to be rather arbitrary only at first glance; only when the general aims of European and stakeholder policies are considered does a clear picture emerge. Whosoever advocates a Europe at the service of companies and privileged groups is arguing against accompanying EU provisions in all possible protected areas (from labour law to environmental law) in order to fuel the so-called "competition between legal systems". However, whosoever – such as the Austrian Federal Chamber of Labour – is acting for a Europe of the working people will undertake anything in order to prevent damaging competition within the internal market at the cost of workers, consumers, or even the environment.

Thus far our resolution is to oppose such demands whereby important regulatory areas such as labour and social law (European social policy within the meaning of the TFEU), consumer protection, or even environmental standards, are to be transferred back de facto to the national level under the pretext of "subsidiarity". In these areas in particular it is, in the opinion of BAK, of great importance to achieve wide harmonisation through EU minimum standards at the level of protection of Member States with the most advanced standards.

Not only that this would ensure the highest possible working and living standards for all citizens in the EU, but ultimately it would also create a level playing field for businesses.

Just how damaging a lack of minimum standards in important areas is can be seen currently in the area of taxation in particular, where the lack of minimum tax rates is causing socially damaging competition based on predatory pricing which is affecting corporation taxes in Europe. Therefore BAK absolutely con-

tinues to support – in contrast to many business associations – the **proposed directive on a Common Corporate Tax Base (COM(2016) 685)** because it represents the first important step to a consolidated corporate tax base in the EU. A further step here would be to regulate the level of corporate tax via a minimum tax base determined in a directive.

Linking the ability to act with strengthening democracy

In the opinion of BAK it is essential to underline that we need a Europe that is capable of acting in de facto all areas covered by TFEU and a return to the national level, in any greater sphere of competence would essentially be a doubtful solution.

However, two things must be considered when exercising such competence: firstly, strengthening the ability to act (through majority decisions), as well as democratic procedures, must be the priority. The Council in particular still tends to act in a non-transparent manner. It would certainly be interesting if citizens could learn more about the positioning of their government's representatives in the Council. The scope for action of the European Parliament must be extended consistently.

Secondly, from the workers' point of view, a series of legal and political commitments have been issued, in particular quite recently, which are seen as serious instances when genuine national competences have been disregarded; we will look at these briefly in the following paragraph.

The fact that this has scarcely figured in the debate about subsidiarity gives rise to scepticism that this debate is being driven primarily by the interests of the business lobby (against those of workers and consumers), and "subsidiarity" is only a pretext to dismantle European protection standards (as appears to be the case currently with the slogan "gold plating" at the national level).

Particularly in view of the work of the Task Force as well as the upcoming Austrian presidency of the Council, we consider it to be an urgent matter that the debate about this subject is carried on in a manner that reflects the interests of workers as well as those of business. If nothing else, it would be a direct contribution to more practical subsidiarity if the assessment of the Chamber of Labour as a self-governing body with over 3.6 million members would duly be given similar scope as the local and regional level in the preparation and implementation of EU policies.

2. Violations of the subsidiarity principle by over-extending EU's competence

Particularly from the workers' point of view, since the millennium a series of anti-employee actions over-extending the competence of EU institutions can be seen. They occur both as excessive judgments of the CJEU as well as inadmissible interventions of other EU institutions in the domains of Member States. Allow us to illustrate this with a few important examples:

Internal market freedoms (in particular CJEU judgments on Laval and Viking)

With its judgments on the prohibition of restrictions, the CJEU has quietly assimilated full competence, which runs counter to the dictate of subsidiarity. On this basis every regulation of national or local government, including Sunday

opening hours, lies within the scope of application of internal market freedoms, insofar as they represent a limitation of the latter.

The fact that the CJEU thus sees itself called on to take its own decisions on national labour relationships and actions taken by trade unions became clear with its judgments in the cases of Laval and Viking (Case C-438/05 and Case C-341/05).

Reducing the scope of economic freedoms to their original scope of application would simply cover such circumstances (discrimination) that could only be determined at the European level.

Economic policy within the economic and monetary union

While strict deficit rules were issued with the introduction of the common currency, which could at best be enforced through sanctions (within the framework of Art. 126 TFEU), the European legislator limited itself solely to coordination in the area of economic policy (in particular Art. 121 TFEU). Common objectives were formulated for orientation; however, the specific implementation of economic policy was to take place at the level of individual countries or below - not least for reasons of sovereignty and subsidiarity.

With the resolution of New Economic Governance (2012), secondary legislation was adopted that deviates from this regulation and tends to give the Commission the possibility of issuing Member States with detailed instructions in the area of economic policy (including regulations on labour relationships). The European level is not appropriate to comprehend the complexity of national systems that have developed over time. Therefore, in the sense of subsidiarity and primary legislation, which simply does not provide for binding instructions (Art. 126 TFEU), the focus should be brought back to the original aims (coordination).

Intervention in the pension system

It is an undisputed fact that determining the form of old age pension systems lies within the decision-making power of Member States. Nevertheless, demands are continually being raised in the "country-specific recommendations" of the European Semester to change the pension system in Austria. As regards content, for example, the implementation of the central demand, which has been raised for years, to introduce automatic steering mechanisms ("automatism") would result in a massive increase in the statutory pension age and indirectly – through higher deductions – lead to significantly lower pensions for many people. The younger generation of today would be affected first and foremost.

The reference point for such demands is generally the – objectively untenable – assessment that the Austrian pension system is not sustainable enough in its current form and in the medium to long term would place too great a burden on the public purse.

However, this can be countered by the fact that the Commission, in its own cost projections for the coming decades, shows only a small increase in the required percentage of GDP in order to finance statutory pensions.

In the EU Ageing Report 2015 – based on 13.9% of GDP in 2013 – an increase to 14.7% by 2035 and from 2045 onwards a slight decrease to a final 14.4%

in 2060 was determined. In view of the fact that in this period an enormous rise in the population segment of the 65+ age group is expected (from 18.2% to 28.9%), this increase is exceptionally moderate and, from the viewpoint of inter-generation fairness, is certainly justified, although the younger generation today has to be offered appropriate protection for their old age.

Regulatory cooperation, investor protection and services of public interest in EU trade agreements

Regulatory cooperation, as is stipulated or planned in the new trade and investment agreements (CETA, Singapore, Japan, MERCOSUR, Mexico, etc.) can have negative effects on the regulations of individual Member States, firstly because they are aimed at reducing current and future **differences in regulations** between the EU and its trade partners; and secondly because democratically based laws can be modified by the European Commission with the trade partners in **transnational bodies** when the trade agreements come into force. This would undermine the democratic decision-making process.

Intervention based on investor protection clauses and the corresponding special investor rights has emerged as being particularly blatant. Even though the latter have to be ratified exclusively by Member States according to the CJEU opinion on the EU-Singapore agreement, the European Commission is pressing on with its policy in favour of big business. Ultimately the European policy on investor protection will give foreign investors the right to compensation when minimum standards are breached ("fair and equitable treatment" as well as "indirect" propriation), which domestic investors do not have.

Such provisions are not only unfair but violate the concept of subsidiarity. It cannot be that, for example, workers', consumer or environmental protection is called into question without corresponding participation by Parliament – whether by technocratic "regulatory bodies" in particular, or by investor protection courts.

This subject is especially sensitive in connection with services of public interest, which are to be liberalised and deregulated by trade agreements. The scope for action of regional and local authorities to provide and organise services of public interest must not be restricted under any circumstances.

3. EU legislative projects which should not be pursued further

Proposed directive on single-member private limited liability companies

Particularly in the area of business law the European Commission regularly tries to intervene in national company law. Most recently the European Commission wanted to oblige Member States to introduce a special form of a limited liability company (Societas Unius personae (SUP), or single-member private limited liability company), into respective national company law in addition to national limited liability companies. The new legal form (1 euro minimum capital requirements, possibility to register online and separation of registered offices) would be in direct competition to national limited liability companies and in the medium term would have threatened national standards vis-à-vis limited liability companies.

The EU subcommittee of the Austrian-National Assembly issued a subsidiarity-related reprimand (May 2014) on the

proposed directive of the Commission (directive on single-member private limited liability companies). Following massive criticism, the European Commission put the above proposal on ice and postponed it to the work programme for 2018. However, it remains to be seen whether another attempt is made, through other measures, to intervene in national company law.

Proposal to introduce a European services e-card

According to the European Commission, the European services e-card will increase cross-border activities in the services sector and encourage competition. In the opinion of BAK, however, this will not create added value, but will make it easier for dishonest businesses and the pseudo self-employed to be active across borders. Austrian companies and their employees could suffer considerable damage due to the resulting unfair competition. It also poses a considerable risk in terms of wage dumping and social dumping.

The introduction of the country of origin principle through the back door (issue and revocation of the card only in the country of origin, home country authority with a decisive role in verifying the prerequisites for the card) could encourage pseudo self-employment and the pseudo posting of workers abroad. In contrast, verification will be made more difficult for the host country. To this can be added extremely short deadlines for the home country and host country to check documentation.

Furthermore, the services e-card would mean an additional high administrative burden. An independent coordination authority must be created and the corresponding personnel made available. Therefore, BAK decidedly rejects the proposal of the Commission to introduce a European services e-card as a disproportionate measure with little prospect of success.

Proposed directive for a proportionality test before adoption of new regulation of professions

The regulation must be seen in close connection with the Services Directive 2006/123/EC (proportionality test as part of the justification for restrictions within the scope of fundamental freedoms): In future Member States must submit all proposed regulations related to access or exercise of a profession to a comprehensive proportionality test. According to this review scheme stipulated by the European Commission, eleven or possibly a further ten criteria would have to be tested, justified thoroughly, and substantiated with qualitative and quantitative supporting documentation.

The proposed directive affects trade regulations, for example, which do not merely regulate the right of access to a profession of those exercising a trade, but also takes into account the necessary interests of workers and consumers to be protected.

There is no need for the proposed mandatory test grid – the principle of the proportionality of professional regulations is already comprehensively enshrined in European and national law. Mobility in the internal services market is sufficiently guaranteed through the Recognition of Professional Qualifications Directive and the Services Directive. Regarding the proportionality of the new directive, the cumulative effects of existing regulations and the new proposed regulations must be considered.

The problem of a lack of proportionality was also recognised by the Austrian Parliament – in March 2017 the Federal Assembly in Austria submitted a subsidiarity complaint.

Proposals contained in the directives on enforcement of Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services and amending Directive 2006/123/EC and Regulation (EC) No. 1024/2012 on administrative cooperation through the Internal Market Information System

The proposals are also closely linked to the Services Directive. A procedure is planned whereby in future national draft regulations for services-related rules would have to be submitted to the European Commission for assessment before they could be enacted.

The scope of application is very wide (e.g. in addition to trade regulations and related procedural safeguards it also applies to regulations under civil and company law). Furthermore, the decision of the European Commission could prohibit the Member State from implementing the measure. The Member State would then only have recourse to the CJEU – but this would reverse the burden of proof onto the Member State (compared with the current legal situation).

Furthermore, the intended interlocking of the notification procedure with the proportionality test being proposed in parallel should also be noted: The interplay of both initiatives would give the Commission, as early as the notification procedure, the possibility of reprimanding individual Member States because the proportionality test for the intended regulation was not carried out properly. The European Commission could therefore intervene down to the last detail in the proportionality test and hence in the legislative process of Member States.

These measures would represent a massive intervention in the sovereignty of Member States and in their legal and legislative powers. Even at the draft stage of a law the Austrian legislator would be deprived of its sole competence for lawmaking, particularly since, in addition to the participation of the European Commission, the inclusion of other Member States would be mandatory, the legislative process would be delayed, and an additional administrative burden created. This would also contradict the aims of administrative burden reduction and efficient lawmaking.

Legislative proposals on the Mobility Package "Europe on the Move"

In the opinion of BAK, the following proposals within the European Mobility Package "Europe on the Move" do not offer any added value for workers in the transport sector. Therefore, for reasons of proportionality, they should be rejected. There is no need to amend the existing regulation on driving times and rest periods. In addition, there is absolutely no need for a European regulation on the use of vehicles hired without drivers.

Therefore, in particular the following legal acts fail under the aspect of subsidiarity, proportionality and "Doing Less More Efficiently":

- Proposal for a Directive amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect

to Directive 96/71/EC and Directive 2014/67/EU on posting drivers in the road transport sector

- Proposal for a Regulation amending Regulation (EC) 561/2006 as regards on minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods
- Proposal for a Directive amending Directive 2006/1/EC on the use of vehicles hired without drivers for the carriage of goods by road

Should you have any further questions
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