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AK Position Paper

Company Law Package of the European Commission

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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.

Renate Anderl
President

Christoph Klein
Director

AK's position in detail

Specifically, the package contains two amendments to the Directive on certain aspects of Company Law (2017/1132): on the one hand, the proposal on the use of digital tools and procedures in company law (digitalisation in company law) and, on the other hand, a proposal on cross-border conversions (transfer of a registered office), mergers and divisions (cross-border corporate mobility).

The BAK comments on the draft directives as follows:

A) Cross-border conversions or transfer of a registered office, mergers, divisions

General remarks

In the past, the European institutions (Commission, Council, Parliament, Court of Justice) have conceded more and more corporate leeway with regard to right of establishment. Most recently, in the autumn of 2017, the CJEU in the so-called "Polbud decision" (C-106/16) fuelled "regime shopping" by declaring a transfer of a registered office to be admissible in principle, even if this is isolated and with no economic activity in the target country. The result of this policy is obvious: many thousands of letter-box companies in Europe, the indirect support of aggressive tax avoidance models of multinational companies, and an increasing erosion of social rights (circumvention of labour law or participation rights).

However, in the Polbud-decision, the CJEU has also called on the European institutions to regulate cross-border matters in company law, such as the cross-border transfer of a registered office, as it states in its decision that the right of establishment may be restricted where justified by overriding reasons of general interest. Protective interests explicitly include those of creditors, minority shareholders, and employees of the company that is moving away.

The BAK welcomes the fact that in the proposed company law package the European Commission points to the negative developments outlined in the introduction and for the first time emphasises the need for European regulation of cross-border corporate mobility. In the future, the rights of employees – especially employment and co-determination – and the creditors should be better protected and "artificial arrangements" should be limited to prevent tax avoidance. The present draft directive is a first step in the right direction, but more steps need to be taken and obvious shortcomings removed when it comes to making corporate mobility fair.

Although the European Commission's efforts to take greater account of the social dimension in cross-border restructuring are recognised it should not be forgotten that the European Commission's proposals are still primarily aimed at promoting and expanding corporate mobility in the European Union. The proposed draft directives also do not represent a paradigm shift towards a stronger stakeholder-oriented corpo-

rate policy. The European Commission continues to pursue a strong neo-liberal orientation – there are many examples of this: for example, the European Commission has neither taken up the principle of the unity of the registered office and the administrative seat as embodied in the Regulation on European Company Law (SE Regulation), nor seriously tackled the problem of freezing, circumventing or eliminating co-determination. For this it would have been necessary to present the Framework Directive on Corporate Co-determination required by the European Trade Union Confederation and the national employee interest groups. By contrast, the European Commission has included the cross-border division in the company law package, although workers' interest groups have spoken out against such a directive in the context of the consultation. In particular, the cross-border division creates new and additional room for manoeuvre, especially in the area of tax law. It is therefore to be seriously feared that, ultimately, multinational companies will be able to implement their aggressive tax avoidance models even more easily.

Against this background, the BAK continues to maintain its central demands regarding the anchoring of the unity of the registered and administrative seat in line with the SE Regulation and a Framework Directive on Corporate Co-determination. Furthermore, there is a need for improvements and clarifications in the present draft, both in terms of classic corporate law and corporate co-determination, in order to ultimately ensure fair corporate mobility.

On the corporate law provisions

For the first time, the directive regulates cross-border conversion (transfer of registered office) and cross-border division. In both projects, the European Commission has set itself the goal of restricting in the future company-law arrangements that either serve tax avoidance or impair the rights and claims of employees, creditors, and minority shareholders. The following comments are intended to show that the draft is still very poorly conceived in this respect and does not ensure that the erroneous developments of recent years (letter-box companies, erosion of workers' rights, tax avoidance) mentioned by the European Commission are contained by the proposed directive.

Art. 86c and Art. 160d

Art. 86c and Art. 160d are the central provisions designed to prevent erroneous developments in recent years. In the English version (only this is available so far) it says in Art. 86c (and in 160d the division content is identical):

"Member States shall ensure that the competent authority of the departure Member State shall not authorise the cross-border conversion where it determines, after an examination …, that it constitutes an artificial arrangement aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members."

The question of what tax avoidance means cannot be answered from the proposal. Thus, it cannot be concluded from the formulation "obtaining undue tax advantages" which case constructions are intended. Are aggressive tax avoidance models of multinational corporations included, or must the tax benefits be decidedly illegal – in the sense of unlawful – in order to be included? Depending on the design, broad interpretations are possible. The expla-

nations in this regard are without significance. The other facts "impairment of the rights and claims of employees, creditors or minority members" are neither defined nor explained on the basis of case structures and thus allow a wide margin of discretion.

The situation is similar with another central term in connection with the intended prevention of abuse. The European Commission introduces the term "artificial arrangement" or "artificial constructions" without specifying this in Art. 86b or 160b (Definitions). Also in the explanatory remarks, no case examples are given which could illustrate the term. This is all the more serious as the existence of an artificial arrangement is a precondition for the possibility of prohibiting cross-border transfer of a registered office or division. In the opinion of the BAK, it is imperative that indicators or criteria are developed that make it possible to clarify this term. In this context, reference is made to the Council Directive on combating tax avoidance practices, which may provide guidance (Dir 2016/1164). In any case, letter-box companies are explicitly mentioned as a case group, which are mainly corporate "artificial arrangements" and basically pursue no economic activity.

On Art. 86g and Art. 86n and Art. 160i and Art. 160p

A key role in the examination of whether and to what extent the transfer of the registered office or division would be abusive ("artificial arrangement") is the responsibility of the independent expert appointed by the competent authority (in Austria presumably the judge of the company register). S/he will, inter alia, review the Company's documents relating to the transfer of the registered office or division (transfer of registered office or division plan, management opinions) in relation to "accuracy" as described in the English version, and to provide a written report on this.

From the BAK point of view, the comments on this are extremely unclear and require further discussion. For example, the question arises as to whether the appointed expert only checks the documents for completeness, or whether s/he also carries out a substantive plausibility check and evaluates the submitted documents. In any case, merely recording the findings does not appear to be purposeful – and certainly not sufficient.

The independent expert also has to collect a large number of indicators on establishment in the target country, such as turnover, number of employees, structure of the balance sheet, registered office, etc. The expert – although s/he has an expert opinion and is employed by the auxiliary body of the competent authority – should apparently not carry out an appraisal of whether and to what extent an economic activity actually takes place ("real seat"), or whether it would be an "artificial arrangement" on the basis of the indicators determined in the target country. According to the present draft, this should be done by the competent authority alone as part of an in-depth review, and only if there are "serious concerns".

This procedure seems very impractical. In all likelihood, the competent authority will normally decide on the basis of the expert report on the issue of the preliminary certificate – and thus based solely on this – whether an "artificial arrangement" exists. An in-depth examination without the involvement of the expert does not appear to be expedient. From the BAK point of view, therefore, the role of the expert, his/her task, as well as the

cooperation of the expert with the competent authority, must be fundamentally revised. There are also no deadlines for the completion and transmission of the expert report to the authority.

As part of the revision of this central provision, the BAK calls for the following changes to be made:

- No exception to the application of Art. 86g or Art.160i for small and micro enterprises: Due to their size, holding structures as well as companies in the construction and transport sectors would not regularly be subject to an independent expert's examination, even though these areas are among the risk groups associated with the formation of "artificial arrangements". Moreover, letter-box companyconstructs would be withdrawn from the expert in the first instance because they never exceed the employment threshold of more than 50 employees necessary for examination.

- Preventative abuse control by an independent expert must also include cross-border mergers to prevent circumvention.

- The key role of the expert is that, in preparing his/her report to the authority, s/he is required to seek prior opinions from relevant interested third parties, to include them in his/her substantive assessment, and to enclose the comments of third parties in the appendix to his/her report. In any case, the financial authorities, social security, and the social partners of the exit state are to be involved. The same applies in the case of an in-depth examination.

- Furthermore, it must be ensured that information from the employee representatives or from employees, are to be treated confidentially by the expert and the competent authority, in order to exclude any repression by the company.

- To ensure the greatest possible transparency, the expert report must be published in its entirety. Information recognised as trade secrets by the authority must be redacted. The Commission proposal that the expert may submit a "separate document" containing confidential information solely for the authority and the Company is strongly opposed.

- The timeframe of two months for appointment of the expert and preparation of the expert report is clearly too short and does not allow a proper examination by the expert. It requires a significant extension of the timeframe to at least four months.

On Art. 86k or Art. 160m

Cross-border restructuring may in no way affect legitimate claims by creditors. The measures envisaged to secure the creditor claims are yet to be discussed in detail. Critically, the BAK considers the proposal that a declaration by the management in the context of the transfer of the registered office or division plan (Article 86k) on the company's solvency should in principle be sufficient as collateral, and further assurances (e.g. third-party guarantees) require a request from creditors who are not satisfied to the authority.

On Art. 86m or Art. 160o and Art. 86p or Art. 160r

From the BAK point of view, the authority of the exit state must be given a stronger position with regard to employee participation as part of the issue of the Pre-conversion certificate (Pre-division certificate). Accordingly, the exit state must, in the context of issuance, review the preliminary certificate and ensure that the rights of participation under Article 86l or 160n are met. An indication in the draft terms of cross border conversion (division) that a co-determination procedure takes place cannot be sufficient for issuing the Pre-conversion certificate (Pre-division-certificate).

Usually, co-determination will be based on the SE Regulation, since one of the cases listed in Art. 86l or Art. 160n will apply. In this case, however, for assessment of whether the conditions for co-determination are fulfilled, the regulation of co-determination before conversion or division is relevant. This should be done through the objectively closer exit state. If this assessment is made by the target country, there is a risk that an incorrect assessment will result in registration and co-determination rights will be disregarded.

The BAK therefore demands that the competent authority of the exit state, and not the authority of the target country, as provided for in the current draft, ensure that the employees' participation rights are secured before the issue of the pre-conversion certificate or pre-division certificates.

An in-depth review must be initiated if there is reason to believe that it is an "artificial arrangement" rather than a "serious concern".

The time frame of one month (paragraph 7) does not allow a proper abuse test. A significant extension of the time frame to at least two months is required. As part of the merger control in competition law, significantly longer examination periods are planned.

On employee participation

General remarks

Co-determination is currently regulated at European level in the context of the creation of the European Company, the European Cooperative, and cross-border mergers. In addition, there are currently no European standards for participation in cross-border transactions in the area of company law.

At the latest since the decision of the Court of Justice in the "Polbud" case of 25.10.2017, by which in the future co-determination rights can be even more easily circumvented, there is an urgent need for action, so that in the context of the European right of establishment these do not fall by the wayside.

The regulations governing participation in cross-border conversion (Article 86l) and in cross-border division (Article 160n) are essentially based on the European Company (SE) regulations. This is basically welcome. However, the SE Regulation, with its before-and-after principle, has one serious weak point. In the case of co-determination, it only provides for the foundation date of the SE. If there was no participation before conversion of a company into a European company, then the principle holds that there must be no such thing after this. This principle is also referred to as "freezing co-determination".

However, as a rule companies exist not just for a few months, but years and decades. Significant changes after the foundation – such as the achievement of certain thresholds that would trigger co-determination – must therefore also be taken into account when it comes to co-determination. It therefore requires a dynamic element that takes into account changes after foundation.

Remarks about specific provisions

Art. 86l and Art. 160n

In order to avoid the "freeze on co-determination", it is envisaged that the threshold should not be set at the national threshold but at 4/5 of the threshold. In terms of co-determination, this new regulation is indeed an advance, but there is a danger that freezing will merely shift this towards the future. The cross-border conversion may therefore not occur shortly before the threshold is reached, but shortly before reaching 4/5 of the threshold. For divisions, circumventions are even easier.

In any case, the 4/5 rule must also apply to "catch-up solutions". It makes little sense for 4/5 of the threshold to trigger negotiations, but this is not reflected in the standard rules.

Example:
An Austrian GmbH employs 260 workers. 4/5 of the threshold of 300 employees have therefore been reached and negotiations on participation are underway. If, in such a case, the standard rules did not provide for co-determination to apply in the event of failure, then the 4/5 rule would be virtually ineffective.

From the BAK point of view, a really dynamic element must be introduced within the framework of this company law package in such a way that a right to renegotiation can be justified within a certain period of time (about 3-5 years) (with a new standard regulation) after exceeding a threshold.

On Art. 86l Paragraph 2 lit. (b) or Art. 160n Paragraph 2 lit. (b)

This exception concerns the case where the target country for workers in branches or establishments located in other Member States does not provide for the same rights of participation as for the workers of the target country itself. The example below shows that not only the companies, but also the subsidiaries, have to be included.

Example:
An Austrian parent company has a supervisory board with four employee representatives, whereby three are sent from subsidiaries in accordance with Section 110 (6) ArbVG. The parent company changes its legal form and relocates its registered office to another Member State X, with part of its parent company remaining in Austria. The subsidiaries also remain in Austria. The national law of Member State X provides for the same level of participation as in Austria (Article 86l, paragraph 2 (a) or Article 160n paragraph 2 (a)), and grants employees of the remaining establishment in Austria the same co-determination rights as those employed in target country X. However, the employees of the subsidiaries are not granted any participation rights.

It is also unclear what is meant by "the same entitlement". It should therefore be clarified that not only "equal rights" but also aliquot participation is meant. Here is another example for a better understanding of the requirement.

Example:
An Austrian company has a supervisory board with four employee representatives. This company changes its legal form and relocates its registered office to another Member State X, with 80% of the parent company remaining in Austria. The national law of Member State X provides for the same level of participation as in Austria (Article 86l, paragraph 2 (a) or Article 160n paragraph 2 (a)) and grants the employees of the remaining establishment in Austria a seat for only one of the four members of the supervisory board, but in principle the same rights of participation (right of participation, seat, voting rights, right to compensation, etc.) as those employed in target country X. The submission does not make it sufficiently clear whether such a rule meets the requirement of "the same entitlement".

On the merger policy

The new rules on negotiated settlement in co-determination apply only to conversion and division. In the case of a cross-border merger, no corresponding adjustment should be made and the current legal situation should continue to apply. This procedure is not appropriate. The BAK therefore calls for the corresponding changes to be made to the Merger Directive.

B) Digitisation of company law – online foundations

The European Commission Directive on the Use of Digital Tools and Processes in Company Law obliges Member States to make the online foundation of companies legally binding. Accordingly, each Member State must be able to lay the foundations for the creation of companies entirely online without the founder(s) having to physically appear with a competent authority or any other person or body. However, the European Commission is aware of the increased abuse potential of its project if it explicitly emphasises legitimate public interests, such as the protection of employees, creditors and minority shareholders, as well as the fight against fraud and abuse.

Many Member States are confronted with the problem that there is massive tax and social fraud on the part of shell companies and that money laundering and terrorist financing are difficult to control. The resulting damage to the European economy, as well as to the vast majority of reputable companies, is enormous and amounts to billions of euros in three digits. Money that will not be provided to European households for education, health, environment and infrastructure development.

In recent years, therefore – both at European level and at the level of the Member States – strong efforts have been made to combat fraud and abuse, which is why the mandatory introduction of online foundations that poses an increased potential for abuse in itself is viewed critically. In the interests of subsidiarity, Member States should be granted freedom of choice here. The European Commission does not oblige Member States to maintain co-determination, even though it emphasises the social dimension in cross-border corporate restructuring.

The foundation process, especially for limited liability companies, is also information on the quality of the legal form. Thus, notarisation of the Articles of Association, coupled with physical identity control of the parties and disclosure of liability, default and bankruptcy filing requirements before the notary, is a pre-

ventive care system that has a positive impact on business and, ultimately, on the viability of a business.

In any case, the BAK welcomes the fact that the European Commission leaves it to the Member States to include notaries in the online procedure.

From the BAK point of view, online creation should be restricted to natural persons in order to ensure a secure identity verification.

Only in the event of a specific suspicion of fraud can Member States prescribe the physical presence of founders before the notary or a competent authority. What is meant by "concrete suspicion of fraud" should be explained in more detail.

Particularly problematic is the extremely short period of five days to complete an online registration. In any case, this is not enough to allow for adequate control and coordinated cooperation between the authorities of the Member States.

An important prerequisite for intra-European administrative cooperation and adherence to the shortest possible deadline is the equipping of the authorities involved in the foundation process with sufficient resources – both in terms of personnel and in terms of technical infrastructure. Smooth cooperation between national authorities also requires clear procedural rules and deadlines. In this regard, an implementing regulation of the European Commission may prove an appropriate instrument.

In conclusion, it is stated that, despite security precautions, online foundation cannot be an equivalent alternative for judicial or notarial examination. Relief for reputable founders is marginal, and the risks associated with increased fraud by fraudsters at the expense of employees, statutory creditors (social security, treasury) or other creditors are disproportionately higher.

As the proposed directives of the European Commission are now the subject of negotiations at Council and European Parliament level, the BAK reserves the right to issue further opinions.

Should you have any further questions
please do not hesitate to contact

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