

MoveS seminar Italy

*The European Labour Authority One Year After.
A Multidisciplinary Dialogue*

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ELA and Working Conditions of Posted workers

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Summary

- Introduction
- 1. Information on Labour Mobility
- 2. Cooperation (among Member States) on Labour Mobility.
- 3. Concerted and joint inspections.
- 4. Mediation between Member States.
- Conclusions

Introduction – Research question

Unfair competition and social dumping in posting of workers: only fraudulent business strategies or state-sponsored/tolerated economic/employment policy instrument too?

1. Information on Labour Mobility (I)

The Authority shall:

A) improve the availability, quality and accessibility of information of a general nature offered to

- - individuals (posted workers),
- - employers (service providers – Article 5 Dir. 2014/67/EU – improved access to information) and
- - social partner organisations,

regarding rights and obligations deriving from the Union acts listed in Article 1(4) [in order] to facilitate labour mobility across the Union.

1. Information on Labour Mobility (II)

The Authority shall:

B) (upon request of one or more MS) support national authorities in identifying the relevant contact points of national authorities in other MS;

C) (upon request of one or more MS) facilitate the acceleration of exchange of information between MS;

D) (upon request of one or more MS) provide information to support the MS concerned in the effective application of the Union acts that fall within the Authority's competence.

2. Cooperation (among Member States) on Labour Mobility

The Authority shall facilitate cooperation and support the effective compliance with cooperation obligations (including on information exchange)

- by (upon request of one or more MS):
 - facilitating the follow-up to requests and information exchanges between national authorities, providing logistical and technical support, including translation and interpretation services, and through exchanges on the status of cases;
 - facilitating and supporting cross-border enforcement procedures relating to penalties and fines;
 - reporting to the Commission twice a year about unresolved requests between MS;
 - considering whether to refer unresolved requests between MS to mediation.

3. Concerted and joint inspections (I)

A) General principles.

The Authority shall,

- (at the request of one or more MS) coordinate and support concerted or joint inspections in the areas within its competence;
- (on its own initiative) suggest to the authorities of the MS concerned that they carry out a concerted or joint inspection;
- Social partner organisations at national level may bring cases to the attention of the Authority.
- Member States, in accordance with the principle of sincere cooperation, shall endeavour to participate in concerted or joint inspections.
- Concerted or joint inspection shall be subject to the prior agreement of all participating MS.
- Member States and the Authority shall keep information about [any] envisaged inspections confidential with regard to third parties.

3. Concerted and joint inspections (II)

- A concerted inspection is an inspection carried out in two or more MS simultaneously regarding related cases, with each national authority operating in its own territory, and supported, where appropriate, by the staff of the Authority;
- A joint inspection is an inspection carried out in a MS with the participation of the national authorities of one or more other MS, and supported, where appropriate, by the staff of the Authority.

3. Concerted and joint inspections (III)

B) Decision by a MS not to participate.

If one or more MS decide not to participate in the concerted or joint inspection:

- the national authorities of the other MS shall carry out such an inspection only in the participating MS;
- the Authority shall establish and adopt the modalities to ensure appropriate follow-up to the decision not to participate, there included suggesting that the non-participating MS carry out its own inspection on a voluntary basis;
- the non-participating Member State shall inform the Authority and the other MS concerned in writing without undue delay of the reasons for its decision and possibly about the measures it plans to take to resolve the case, as well as, once known, about the outcomes of such measures;
- non-participating Member States shall keep information about such an inspection confidential.

3. Concerted and joint inspections (IV)

C) Arrangements for concerted and joint inspections (I).

The inspection agreement.

- An agreement to carry out (concerted and joint) inspections shall be signed between the participating Member States and the Authority.
- The Authority shall establish a model agreement in accordance with Union law, as well as national law or practice.
- The inspection agreement shall set out the terms and the conditions for carrying out that inspection, including the scope and purpose of the inspection and, if relevant, any arrangements about the participation of the staff of the Authority.
- The agreement may include provisions which enable concerted or joint inspections, once agreed and planned, to take place at short notice.

3. Concerted and joint inspections (V)

C) Arrangements for concerted and joint inspections (II).

The Inspection

- Member States shall grant officials from another MS participating in inspections an appropriate role and status, in accordance with the law or practice of the MS where the inspection is carried out.
- Concerted and joint inspections shall be carried out in accordance with the law or practice of the MS in which the inspections take place.
- Any follow-up to such inspections shall be carried out in accordance with the law or practice of the MS concerned.
- Concerted and joint inspections shall take place in an operationally effective manner.
- It shall be possible to use the information collected during concerted or joint inspections as evidence in legal proceedings in the MS concerned, in accordance with the law or practice of that MS.

3. Concerted and joint inspections (VI)

Duties of the parties

- The Authority shall provide conceptual, logistical and technical support, and, where appropriate, legal expertise, if requested by the MS concerned, including translation and interpretation services, to MS carrying out concerted or joint inspections.
- The authority of a MS that carries out a concerted or joint inspection shall report to the Authority on the outcome of the inspection within that MS and on the overall operational running of the concerted or joint inspection at the latest six months after the end of the inspection.

3. Concerted and joint inspections (VII)

Reporting

- If the Authority, during concerted or joint inspections, or during any of its activities, becomes aware of suspected irregularities in the application of Union law, it may report those suspected irregularities, where appropriate, to the MS concerned and to the Commission.
- Information on concerted and joint inspections coordinated by the Authority shall be included in the reports that are to be submitted to the Management Board twice a year.
- Such reports shall be sent also to the Stakeholder Group, with sensitive information duly redacted.
- A yearly report on the inspections supported by the Authority shall be included in the Authority's annual activity report.

4. Mediation between Member States (I)

- The Authority may facilitate a solution in the case of a dispute between two or more MS regarding individual cases of application of Union law in areas covered by this Regulation, without prejudice to the powers of the Court of Justice.
- The purpose of mediation shall be to reconcile divergent points of view between the MS that are party to the dispute and to adopt a non-binding opinion.
- The Authority shall launch a mediation procedure upon request of one or more of the MS concerned.
- The Authority may also suggest launching a mediation procedure on its own initiative.
- Mediation shall be conducted only with the agreement of all MS that are party to the dispute.

4. Mediation between Member States (II)

- The first stage of mediation shall be conducted between the MS that are party to the dispute and a mediator, who shall adopt a non-binding opinion by common agreement. Experts from the MS, the Commission and the Authority may participate in the first stage of mediation in an advisory capacity.
- If no solution is found in the first stage of mediation, the Authority shall launch a second stage of mediation before its Mediation Board, subject to the agreement of all MS that are party to the dispute.

4. Mediation between Member States (III)

- The Mediation Board, composed of experts from MS other than those that are party to the dispute, shall seek to reconcile the points of view of the MS that are party to the dispute and shall agree on a non-binding opinion.
- Experts from the Commission and the Authority may participate in the second stage of mediation in an advisory capacity.
- The Management Board shall adopt the rules of procedure for mediation, including working arrangements and the appointment of mediators, the applicable deadlines, the involvement of experts from the Member States, the Commission and the Authority, and the possibility of the Mediation Board to sit in panels composed of several members.

4. Mediation between Member States (IV)

- Where a MS that is party to the dispute decides not to participate in mediation, it shall inform the Authority and the other MS that are party to the dispute in writing, including by electronic means, of the reasons for its decision within the period set in the rules of procedure.
- When presenting a case for mediation, MS shall ensure that all personal data related to that case is anonymised in such a manner that the data subject is not or no longer identifiable. The Authority shall not process the personal data of individuals concerned by the case at any point in the course of the mediation.
- Cases in which there are ongoing court proceedings at national or Union level shall not be admissible for mediation by the Authority. Where court proceedings are initiated during the mediation, the mediation procedure shall be suspended.

4. Mediation between Member States (V)

- Within three months of the adoption of the non-binding opinion, the Member States that are party to the dispute shall report to the Authority with regard to the measures that they have taken for the purpose of following up on the opinion or, where they have not taken measures, with regard to the reasons why they have not done so.
- The Authority shall report to the Commission twice a year with regard to the outcome of the mediation cases it has conducted and about cases which were not pursued.

Conclusions

- Specific features of the Social Dimension of EU Integration.
- The role of the (European) Social Partners) – horizontal subsidiarity
- The uncertain boarder between regulative diversities and unfair (fraudulent) competition.
- Harmonization of living and working conditions while the improvement is being maintained.
- Economic and Social Cohesion

Born Under a Contradictory Star. ELA as the Champion of Labour Mobility or the Enforcer of Anti- Fraud Rules?

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*The European Labour Authority One Year After. A
Multidisciplinary Dialogue – LUISS, 1 December 2020*

Outline

- Legal bases and ELA objectives
- Fairness in labour mobility: who decides?
- ELA instruments to ensure fairness: limits and innovation

The legal bases

- Articles 46 and 48 TFEU
 - ✓ No reference to free movement of services as in the Commission Proposal
 - ✓ adopt the necessary measures “to bring about” free movement of workers and to set up a mechanism for the coordination of national social security systems
- But, is this what ELA has been created for?

ELA objectives and scope of action

- Art. 2 ELA Regulation: «ensuring fair labour mobility»
- Recital 6: «to help strengthen fairness and trust in the internal market»
- Focus on labour mobility, not free movement of workers
 - ✓ Cases not covered by equal treatment and lex loci laboris rule (as they represent a restriction to free movement of services)

Who decides what is unfair

- Standard rule: it is a matter for the State of establishment
 - Posted workers: the receiving State cannot but accept the documents, such as A1 or E101 certificates, issued by the competent authorities of the sending State
 - In case of disagreement: must activate cooperation procedures or refer to the Administrative Commission. No unilateral rejection
- Movement across borders, but controls stop at the border

The standard rule in the case law (I)

- Partial exception in *Altun* (2018)?

«a national court may, in the context of proceedings brought against persons suspected of having used posted workers ostensibly covered by such certificates, disregard those certificates if, on the basis of that evidence and with due regard to the safeguards inherent in the right to a fair trial which must be granted to those persons, it finds the existence of such fraud»

The standard rule in the case law (II)

- *CRNPAC v Vueling* (2020)

certificates are binding also for host States' judicial authorities and that the latter cannot disregard them, even in "presence of concrete evidence of the existence of fraud", unless the matter has been first brought to the attention of the issuing authorities by activating the cooperation procedure regulated by Article 76 of Regulation (EU) 883/2004

Fairness as an exception

- Ban on unilateral action (by the receiving State) to preserve the integrity of the internal market
- The rule is free movement (and regulatory competition), while fairness is just an exception
 - ✓ Substantive and procedural limits
- What is the impact of ELA?

ELA instruments to ensure fairness

- Facilitating cooperation (art. 7)
- Promoting concerted and joint inspections (artt. 8-9)
 - ✓ to promote cross-border cooperation
 - ✓ ELA can just «suggest» to carry out a CJI
- Mediation (art. 13)
 - ✓ to facilitate a solution in the case of a dispute between two or more Member States regarding individual cases

Cooperative logic

Participation is voluntary and there is no sanction for uncooperative behaviors

- ✓ Infringement procedure: unlikely
- ✓ Receiving State's courts can dismiss the certificate (but there is the need to bring evidences)

Logic of cooperation (Article 48 TFEU) to cope with problems deriving from competition: will it work?

Some interesting innovations

- Support for ELA is crucial: not an enforcement agency
- Cooperation with social partners
 - ✓ Article 8: soc partners can bring cases (procedure to be defined) – no coincidence with interests of States
 - ✓ Involvement of social partners at national level is needed

Thanks for your attention

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Luiss, 1st December 2020

**The Institutional Design of the European
Labour Authority**

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European Labour Authority and Social Security Coordination

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Rome, 1 December 2020

Overview

- ELA's mandate and social security coordination
- Relationship with the Administrative Commission
- Evaluation

ELA's mandate

- “labour mobility across the Union **and** the coordination of social security systems”
 - Articles 1(2); recitals 6, 8, 10, ..
 - Also seems to include social security coordination beyond labour mobility
 - Third countries may participate (Article 42(2)):
 - EEA, Switzerland, UK (Withdrawal Agreement)

ELA's mandate

- Article 2: “contribute to ensuring fair labour mobility across the Union **and assist Member States and the Commission in the coordination of social security systems**”
 - “Without prejudice to the tasks and activities of the Administrative Commission for the Coordination of Social Security Systems” (recital 11)

ELA's mandate

- Article 1(4)(c)
 - Regulation (EC) No 883/2004 and Regulation(EC) No 987/2009
 - including the provisions of ... Regulations (EEC) No 1408/71 and (EEC) No 574/72 insofar as they are still applicable
 - Regulation (EU) No 1231/2010...and ... Regulation (EC) No 859/2003
 - extending the provisions of Regulations (EEC) No 1408/71 and (EEC) No 574/72 to nationals of third countries
 - Very complex and intricate system of coordination of national social security schemes
 - Interpreted by numerous judgments of the CJEU

Challenges of EU social security coordination

- Determination of applicable legislation (Title II of Regulation 883/2004)
 - *Lex locis laboris*
 - Special rules for posting of workers and the pursuance of activities in more than one Member State
 - Subject to specific conditions: control on the fulfillment of these conditions
 - Circumvention strategies and fraud such as letter-box companies and bogus self-employment
 - Implementation of these rules on highly mobile workers (transport sector) and new forms of labour (gig-economy)
 - Disputes between Member States (A1 forms)

Challenges of EU social security coordination

- Equal treatment
 - Residence clauses for access to benefits
- Aggregation of periods
 - Problems with the qualification of periods of insurance, employment, self-employment and residence
- Export of benefits
 - Discussions on export of unemployment benefits and family benefits
- Administrative cooperation, including intensive exchange of information

ELA's mandate

- Article 5: Information on labour mobility
 - For individuals, employers and social partners
 - point c): “support Member States in complying with the obligations on the **access to and dissemination of information** relating to ... **social security coordination** as laid down in Article 76(4) and (5) of Regulation (EC) No 883/2004”
 - Mutual information and cooperation between Member States: crucial for the daily implementation of the coordination system

ELA's mandate

- Article 7: Cooperation and exchange of information between Member States
 - Identifying relevant contact points
 - Technical support, including translation and interpretation services
 - Dissemination of best practices
 - Facilitate cross-border enforcement procedures relating to penalties and fines
 - Recovery of contributions (Article 84 Reg. 883/2004 and Article 75 *et seq.* of Regulation 987/2009)

ELA's mandate

- Articles 8 and 9
 - Coordination and support of concerted and joint inspections
- Article 10: labour mobility analysis and risk assessment
 - recital 20: “In order to keep track of emerging trends, challenges, or loopholes in the areas of labour mobility **and social security coordination**, the Authority should develop, in cooperation with Member States and, where appropriate, the social partners, an **analytical and risk assessment capacity**”

ELA's mandate

- Article 11: support to capacity building
 - recital 21: “to strengthen the capacity of national authorities in the areas of labour mobility **and social security coordination** and improve consistency in the application of Union law ..., the Authority should provide **operational assistance to national authorities, including developing practical guidelines, establishing training and peer learning programmes**”
- Article 13: “mediation between Member States”
 - See below
- Article 14: cooperation with specialized bodies
 - Including the Administrative Commission
 - recital 42: “In the field of **social security coordination**, the Authority and the **Administrative Commission** should **cooperate closely with the aim of achieving synergies and avoiding any duplication.**”

Cooperation with the Administrative Commission

- **Administrative Commission for the Coordination of Social Security Systems** (Articles 71 – 74 Reg. 883/2004)
 - Attached to the European Commission and made up by government representatives
 - *Sui generis* character; not part of the comitology
 - No role for the European Parliament and stakeholders
 - Deals with matters of implementation, interpretation and cooperation between Member States
 - Adopts decisions on interpretation, cooperation and exchange of information (forms)
 - Can make relevant proposals to improve and modernize the coordination
 - Decisions are not legally binding

Commission's proposal of 2018

- Transfer of some operational (not regulatory) competences of the Administrative Commission (Admin. Com.) and its bodies to ELA
 - Amendments to Articles 72, 74 and 76 of Regulation 883/2004 and Articles 5, 6, 65 and 69 of Regulation 987/2009
- Transfer to ELA of the tasks of the **Audit Board** (which would be abolished)
 - Support the Admin. Com. with regard to the financial aspects of the social security regulations and the statement of claims between Member States
 - Notification of annual costs relating to health care and statements on annual accounts

Commission's proposal of 2018

- Mandate to propose to the Admin. Com. common architecture rules for the operation of data processing services
 - Transfer to ELA of the tasks of the “**Technical Commission for Data Processing**” (which would be abolished)
 - Plays a crucial role in the transmission of data between the institutions of the Member States
- Intervention of ELA when a solution on a disagreement of the interpretation of the social security regulations cannot be found
 - Mediation role for the ELA in the event of disputes between Member States

Current rules on disputes between MSs regarding the determination of applicable legislation

- CJEU's case law
 - A1 form remains valid as long as it is not withdrawn or altered by the issuing institution (except in cases of fraud to be verified by a court)
 - Possibility to submit the dispute to the Admin. Com.
- Decision A1 of the Admin. Com.
 - Dialogue and conciliation procedure; Conciliation Board
 - No binding decisions
 - Growing dissatisfaction on the effectiveness of this procedure
- Pending proposals (2016) to amend Reg. 883/2004 and 987/2009
 - To facilitate the settlement of disputes and to make the control of the A1 forms more effective

Commission's proposal of 2018

- Proposals on the transfer of tasks from the Admin. Com. to ELA **opposed by European Parliament and Council**
 - Did not want to abolish the Audit Board and the Technical Commission and abandon their competences and experiences of many decades
 - Council document 6128/19 of 14 February 2019:
 - “The competences of the Administrative Commission remain untouched as the Administrative Commission had the final say on social security coordination issues and its acquis has to be taken into account by ELA”.
 - Compromise on mediation

Mediation: Article 13

- On disputes between Member States regarding individual cases
 - Not on disputes between individuals and Member States
 - Role for European Commission, including SOLVIT
- Purpose is to reconcile divergent points of view and to adopt non-binding opinion
- Upon request of one or more Member States or on ELA's own initiative
 - Voluntary participation of the Member States
- Two stages: mediator and Mediation Board
 - May issue non-binding opinions
 - Not applicable when the case is pending before a court

Mediation: disputes on social security coordination

- Article 13(10)
 - “Mediation shall be without prejudice to the competence of the Administrative Commission including all decisions it takes. Mediation shall take into account all relevant decisions of the Administrative Commission.”
- Article 13(11)
 - Admin. Com. needs to be informed of any dispute relating to social security coordination
 - A cooperation agreement must be established between ELA and the Admin. Com.
 - ELA shall refer such case to the Admin. Com. upon request of the Admin Com (in agreement of the Member States concerned) or of a MS concerned

To conclude

- ELA's role in network building, mutual learning and peer support
 - ELA's important role in improving information on the social security coordination system
 - ELA as a space for cooperation and exchange of information between Member States in this field
- ELA's role in enhancing correct implementation of rights of mobile workers and persons
 - ELA as a coordinator and supporter of joint inspections in this field
 - ELA's role as mediator: to be seen
- Input of stakeholders is an asset
 - Absent in the work of the Admin. Com.

To conclude

- But:
 - Overburden of tasks when it comes to issues related to the complex system of social security coordination
 - All on a voluntary basis as far as Member States are concerned and success depends on the will of the Member States to cooperate

Thank you for your attention
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Issues

- Governance and role of stakeholders
- Access to information
- Cooperation with MS
- Interaction/engagement with other EU institutions and bodies
- Mediation

I. Governance and role of stakeholders

- ELA's management
- Stakeholders' representation within a specific body as well as the Management Board

II. Access to information

- Development compared to other EU agencies
- Coordination of EURES
- Exchange of information between Member States, also in light of Directive 2014/54/EU

•III. Cooperation with MS

- Coordinating MS' action through concerted and joint inspections (reporting to the MS and the Commission)
- Analyses and risk assessment via a number of instruments (involvement of MS at all stages)
- Capacity building
- Fight against undeclared work

- IV. Interaction with specialized bodies
 - Advisory Committee for the Coordination of Social Security Systems and Advisory Committee on the Free Movement of Workers
 - Administrative Commission (different composition and possible overlaps)

- V. Mediation

- Voluntary mechanism

- Interplay with the Administrative Commission

- ELA, *today*

- Development in the enforcement of the European Pillar of Social Rights

- Complementary powers

- Evolution: stakeholders' role enhanced, inspections, access to information, great involvement of MS

- Problematic institutional set-up: coordination with other EU bodies