4

Dipartimento di Giurisprudenza
dell'Università degli Studi di Ferrara
Sede di Rovigo

4

LABOUR MOBILITY AND TRANSNATIONAL SOLIDARITY IN THE EUROPEAN UNION

A CURA DI

SILVIA BORELLI - ANDREA GUAZZAROTTI

LABOUR MOBILITY AND TRANSNATIONAL SOLIDARITY IN THE EUROPEAN UNION

Jovene editore
2019

ISBN
9 788824 326278

€ 16,00

Dipartimento di Giurisprudenza
dell'Università degli Studi di Ferrara
Sede di Rovigo

4

LABOUR MOBILITY AND TRANSNATIONAL SOLIDARITY IN THE EUROPEAN UNION

A CURA DI

SILVIA BORELLI - ANDREA GUAZZAROTTI

Jovene editore
2019

ISBN 978-88-243-2627-8

JOVENE EDITORE
Via Mezzocannone 109 - 80134 NAPOLI NA - ITALIA
Tel. (+39) 081 552 10 19 - Fax (+39) 081 552 06 87
web site: www.jovene.it e-mail: info@jovene.it

Printed in Italy Stampato in Italia

INDICE

SILVIA BORELLI

"WHICH WAY I OUGHT TO GO FROM HERE?" THE EUROPEAN LABOUR AUTHORITY IN THE INTERNAL MARKET REGULATION

"Would you tell me, please, which way I ought to go from here?"
"That depends a good deal on where you want to get to"
"I don't much care where"
"Then it doesn't matter which way you go".
LEWIS CARROLL, *Alice in Wonderland*

1. *The ELA's origin*

On 13 September 2017, the former President of the European Commission, Jean-Claude Juncker announced, in his speech on the State of the Union, the creation of a European Labour Authority (ELA), for ensuring fairness in the single market. He introduced the Authority as «a new European inspection and enforcement body» aimed at assuring «that all EU rules on labour mobility are enforced in a fair, simple and effective way». After Juncker's speech, a public consultation was quickly launched (27.11.2017-8.1.2018) and stakeholders' opinions were collected. On 13 March 2018, the Commission published its proposal for a Regulation establishing a Labour Authority (COM(2018)131). The trilogue was opened on the 26 of February 2019 and was particularly short, as on the 16 of April 2019 the agreement reached in the trilogue was approved by the European Parliament.

The speed in which the ELA Regulation (Regulation (EU) 2019/1149) was adopted proves the widespread consensus on the creation of ELA: at least on paper, none of the Member States could vote against a body aimed to strengthen the enforcement of EU rules. Simi-

larly, no enterprise or business organisation could lobby against fair labour mobility in the internal market. Besides the good intentions, it is however important to verify what happens when it comes to facts. Can ELA really fulfil its ambitious objectives, «to contribute to ensuring fair labour mobility across the Union and assist Member States and the Commission in the coordination of social security systems within the Union» (Article 2 of ELA Regulation)?

In this short note, the main challenges that ELA will face are addressed. In particular, functional and structural problems that can hamper ELA's functioning will be examined, considering the tasks that it shall perform, the staff and the budget of the Authority, and its role in the internal market.

2. *The ELA's tasks and structure*

Article 2 of Regulation (EU) 2019/1149 specifies ELA's tasks: on one side, it shall «facilitate access to information on rights and obligations regarding labour mobility across the Union as well as to relevant services»; on the other side, it shall «facilitate and enhance cooperation between Member States in the enforcement of relevant Union law across the Union» and «in tackling undeclared work». Moreover, ELA shall «mediate and facilitate a solution in cases of cross-border disputes between Member States».

Therefore, ELA has a double target: improving the availability, quality and accessibility of information on labour mobility, on one side; ensuring the effective enforcement of EU rules, on the other side. Considering the limited staff and budget of the Authority[1], it will be of paramount importance to clarify, in the ELA annual work programme, how these two main objectives will be concretely performed (Article 24 of ELA Regulation). In fact, 144 people will be working at the Authority by 2024. These will consist of 84 Temporary Agents and Contract Agents (staff members of the Authority), plus 60 Seconded National Experts (staff of the public sector in Member States, seconded to the Authority), including the National Liaison Officers (NLOs).

The role of the NLOs is crucial since they shall facilitate the cooperation and exchange of information, and the support and coordination

[1] Up to 2024, ELA's financial resources will be 49,5 million € (cf. Article 25 of ELA Regulation).

of inspections[2]. Moreover, they will act as national contact points for questions from their Member States and relating to their Member States, either by answering those questions directly or by liaising with their national administrations (Article 32 of the ELA Regulation). As suggested by the Advisory Group on ELA, each Member State should sign a domestic inter-institutional agreement to define the way of working with the National Liaison Officer, and the contact points within the single national authorities to which she has to relate. Moreover, national social partners should be involved in the institutional body that will deal with the NLO, so as to reflect the tripartite composition of the ELA management board and to commit national social partners in the enforcement of the EU rules.

ELA's effective functioning depends thus on if, how and to what extent Member States provide their NLO with appropriate support arrangements, i.e. if and how Member States respect their duty of sincere cooperation (Article 4 § 3 TUE). And this is currently one of the main problems in the EU (see below).

It should be also considered that ELA integrates several existing bodies (the European Platform to enhance cooperation in tackling undeclared work; the Committee of Experts on Posting of Workers; the Technical Committee on the Free Movement of Workers; the European Coordination Office of EURES). Each of these bodies currently has its own regulation, its tasks and its work programme. During the transitional phase, it will be thus very important to integrate these already existing functions into ELA's objectives. However, in order not to overwhelm the Authority, it would be necessary to avoid any overlap among the offices and bodies that will handle the different topics.

Another main challenge will be the cooperation with other Agencies that deal with labour and social issues (such as the European Centre for the Development of Vocational Training, the European Agency for Safety and Health at Work, the European Foundation for the Improvement of Living and Working Conditions, and the European Training Foundation), as well as Agencies that fight against organised crime and trafficking in human beings (such as the European Union Agency for Law Enforcement Cooperation - Europol - and the European Union Agency for Criminal Justice Cooperation - Eurojust) (Article 14 of ELA

[2] As suggested by the Advisory Group on ELA, the National Liaison Officers should have primarily a back-office coordinating role (e.g. establishing contacts, ex-ante contacts between offices, ensuring complete documentation, data exchange).

Regulation). It will be, for example, important to establish an information exchange mechanism among these Authorities. Furthermore, the already existing practices and tools set up by Eurojust and Europol can serve an inspirational input for establishing the operational service offer of ELA.

ELA shall also collaborate with the Administrative Commission for the Coordination of Social Security Systems, the Advisory Committee for the Coordination of Social Security Systems, the Advisory Committee on the Free Movement of Workers, the Single Digital Gateway, Your Europe and Your Europe Advice information and services, and the SOLVIT network. In so far as is necessary in order to achieve its objectives, ELA may also cooperate with the competent authorities of third countries and with international organisations (Article 42 of ELA Regulation).

3. *ELA and National Labour Inspectors*

In its Staff Working Document accompanying the ELA proposal (SWD(2018)58, p. 13), the Commission has pointed out the cross-country differences in staff and resources on national enforcement authorities and their lack of knowledge in dealing with cross-border cases[3]. In fact, transnational fraud and abuse require specialised knowledge (on European and International law) and linguistic abilities that national inspectors often do not have. Moreover, instruments to support administrative cooperation on cross border mobility issues are still limited; in particular, bilateral agreements are few and very heterogeneous.

To solve these problems, ELA «shall support Member States with capacity building aimed at promoting the consistent enforcement of the Union law», e.g. through training programmes, staff exchanges or guidance for inspections in cases with a cross-border dimension (Article 11 of ELA Regulation). ELA can also support national risk assessment mecha-

[3] See also VAN HOEK A. - HOUWERZIJL M., *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, Brussels, 2011, p. 154 ff.; HEYES J. - HASTINGS T., *The Practices of Enforcement Bodies in Detecting and Preventing Bogus Self-Employment*, Underclared Work Platform, 2017, p. 56; KALL K. - LILLIE N., *Protection of Posted Workers in the European Union: Findings and Policy Recommendations based on existing research*, PROMO briefing paper, 2017, p. 27; ČANĚK M. - KALL K. - LILLIE N. - WALLACE A. - HAIDINGER B., *Transnational Cooperation among Labour Regulation Enforcement Agencies in Europe: Challenges and Opportunities Related to the Posting of Workers*, Technical Report, 2018, p. 10.

nisms so as to better target inspections[4]. In order to encourage the stipulation of new bilateral agreements, the Advisory Group on ELA has also recommended that ELA should lay down possible templates that national authorities can use. Furthermore, to facilitate the cooperation among Member States, ELA shall provide logistical and technical support (including translation and interpretation services), and shall promote the use of data exchange mechanisms, including the *Internal Market Information System* (IMI), the *Electronic Exchange of Social Security Information* (EESSI) and the *European Register of Road Transport Undertakings* (ERRU) (Article 7 of ELA Regulation)[5]. However, ELA is not in charge of the direct management of these IT tools, and neither can it modify the legislation applicable to them. Therefore, many shortcomings of the IMI system will remain[6]. Moreover, in front of a State that delays sending information, sends incomplete information, or refuses to cooperate, the Authority will only be able to report such conduct to the Commission which, so far, has never proceeded against countries that do not comply with the duty of sincere cooperation in this field.

In its proposal for a European Labour Authority, the Commission has also rejected to establish mandatory requirements on information ex-

[4] The Advisory Group on ELA has recommended ELA to: map the existing data sources produced by the Member States in different contexts with a primary focus on comparing risk assessment tools to target labour inspections; explore possibilities to share data that can facilitate analysis, risk assessment and common inspection work; aim at public accessibility of its data to the extent possible, including to social partners.

[5] Vos E., *The proposed European Labour Authority: Profile and Governance*, EP Briefing, 2018, p. 8.

[6] Many researches have underlined the need to improve the IMI system, denouncing: the incomprehensiveness of the information provided; the fact that some information is kept by authorities that are not IMI members; the fact that information is provided without proper investigation/evaluation; rules on protection of privacy and confidentiality that prohibit information exchange (cf. Articles 13-17 Regulation 1024/2012 on administrative cooperation through the Internal Market Information System; see also ECJ, 1.10.2015, C-201/14, *Bara*); rules on penal secrecy that hamper information exchange; the lack of legal value for information gathered from foreign authorities and shared via IMI; the lack of an alert mechanism in case of letterbox companies or human trafficking; the lack of interaction with other information exchange tools; its limited material scope (*Commission Staff Working Document. Impact assessment accompanying the Proposal for a Regulation establishing a European Labour Authority*, SWD(2018)68, p. 11; AA.VV., *Transnational posting of workers within the EU. Guidelines for administrative cooperation and mutual assistance in the light of Directive 2014/67/EU*, 2018, in *http://www.adapt.it/enacting/2_1_7_Enacting%20Guidelines%20for%20Administrative%20Cooperation.pdf*, p. 40-44; Čaněk M. - Kall K. - Lillie N. - Wallace A. - Haidinger B., *Transnational Cooperation among Labour Regulation Enforcement Agencies in Europe: Challenges and Opportunities Related to the Posting of Workers*, cit., p. 15 ff.).

change (SWD(2018)68, p. 27). Consequently, neither an *ex officio* obligation to inform the concerned Member States and ELA in case of suspected irregularities, nor other forms of automatic exchange of information among national authorities have been introduced[7].

It will also be very difficult for ELA to promote data sharing between Member States «to facilitate the access to data in real time and detection of fraud» (Article 7 § 4 of ELA Regulation). Even if ELA «may suggest possible improvements in the use of those mechanisms and databases», it has no competences in regulating the existing data sharing systems (as the *Business Registers Interconnection System*)[8]. Moreover, the functioning of the existing data sharing systems and the development of new ones depend on the Member States' will; and the difficulties in implementing the existing data sharing systems clearly prove their weak commitment.

The problems in tackling transnational fraud and abuse are also increased by the shortages in labour inspectorates' staff and resources. Some researches have underlined the negative impact that the rules on economic governance imposing cuts on public expenditure have on the appropriateness and the effectiveness of controls, reducing the number of Labour Inspectors and their operational tools[9]. Moreover, in many

[7] Cf. Article 7 § 4 Directive 2014/67 (Enforcement Posting of Workers Directive) that obliges Member States to communicate, on their own initiative, any relevant information, where there are facts that indicate possible irregularities.

Cf. Articles 29, § 3 and 32 Directive 2006/123 on services in the internal market: the former establishes a duty for the Member State to inform all other Member States and the Commission in case a provider could cause serious damage to the health or safety of persons or to the environment; the latter regulates an alert mechanism in case a service activity that could cause serious damage to the health or safety of persons or to the environment.

Cf. Article 16, § 1 and 26 Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws: the former obliges competent authorities and the Commission to inform each other in case of reasonable suspicion that a widespread infringement is taking place; the latter establishes a duty to notify the Commission and other competent authorities of any reasonable suspicion that an infringement that may affect consumers' interests in other Member States is taking place.

Cf. Articles 8, 8a, 8aa and 9 Directive 2011/16 on the automatic and spontaneous exchange of information in the field of taxation and Article 13 Regulation 2010/904 on the automatic and spontaneous exchange of information in the field of VAT.

[8] Trade unions have also demanded the creation of a digital European Social Security Card, where social security records are traced (Giubboni S., *The new European Labour Authority and social security coordination. Some preliminary remarks*, in *Riv. dir. sic. soc.*, 2018, p. 529).

[9] Article 10 of the Directive 2014/67 requires Member States to ensure «that appropriate and effective checks and monitoring mechanisms provided in accordance with national law and practice are put in place and that the authorities designated under national law carry

countries, the competences to tackle labour and social fraud and abuse are fragmented among different authorities (e.g. fiscal, labour, social security inspectors; road police) that often do not cooperate[10].

It should as well be noted that, in many States, national inspectors are evaluated according to the results of their controls. For this reason, transnational cases are often problematic: on one side, national labour inspectors can be required to collaborate with authorities of a different country, without having a direct interest in the inspection (e.g. in a case of letterbox company, the Home State authority does not have any direct advantage in denouncing it); on the other side, cross-border inspections are usually longer than internal ones and are under the risk to remain empty-handed, because the enquired enterprises have disappeared. Recent decisions of the Court of Justice have also had a negative impact on national inspections, undermining the outcomes of multiannual enquires (see ECJ, 27.4.2017, C-620/15, *A-Rosa Flussschiff*; 6.9.2018, C-527/16, *Alpenrind*).

In order to promote cross-border cooperation, the ELA Regulation lays down rules on concerted and joint inspections (see below), specifying that it shall be possible to use the information collected during concerted or joint inspections «as evidence in legal proceedings in the Member States concerned, in accordance with the law or practice of that Member State» (Article 9 § 7). However, nothing obliges Member States to recognise legal value to the findings resulting from concerted and joint investigations. ELA should also recommend Member States to provide a positive evaluation, according to the national system of evaluation in the

---

out effective and adequate inspections on their territory in order to control and monitor compliance with the provisions and rules laid down in Directive 96/71/EC».

[10] Cremers J., *The enhanced inspection of collective agreed working condition*s, Undeclared Work Platform, 2017. In the EU regulation on posting, there are no rules to grant labour inspectors the investigation and enforcement powers necessary for its application, as in other fields (cf. Article 9, § 3 and 4 Reg. 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws; Articles 9, 9a, 9b, 9c and 9d Decision 2002/187/JHA on Eurojust). Recently, a duty for the requested authority to obtain the information from other authorities in the Member State has been introduced (Article 4, § 2 Directive 96/71 as modified by the Directive 2018/957). However, a duty for the requested authority to undertake the necessary investigations or to take any other appropriate measures in order to gather the required information is still missing (cf. Article 11, § 2 Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws; Article 29, § 2 Directive 2006/123 on services in the internal market; Article 6 § 1 Directive 2011/16 on administrative cooperation in field of taxation; Article 7 § 1 Regulation 2010/904 on administrative cooperation in the field of VAT).

public administration, to national inspectors that participate to joint investigations or other forms of cross-border cooperation, or investigate on transnational cases. However, again, it depends on the State's will.

Moreover, the ELA Regulation does not establish the possibility, for a national authority, to demand to competent authorities of other Member States to take all necessary enforcement measures to bring about the cessation or prohibition of an infringement, including precautionary measures, as it happens in other fields[11]. Neither the ELA Regulation rules on the power, for the inspectors participating to the joint inspection, to investigate and to adopt the necessary enforcement measures[12]. Moreover, the Regulation on the coordination of social security systems does not establish the principle of automatic payment of social security benefits, according to which these benefits are due to workers, even when the employer has not regularly paid the contributions due to the social security institutions (cf. Article 2116 of the Italian Civil Code). This means that, in many cases of transnational fraud and abuse, workers remain empty-handed. And this hardly complies with the fundamental right to an effective remedy, guaranteed by Article 47 CFREU that, according to the ECJ, «is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such» (ECJ, 17.4.2018, C-414/16, *Egenberger*, § 78; on the right to an effective remedy see also Article 11 of the Enforcement Posting of Workers Directive).

---

[11] Cf. Articles 9, 19 and 21 Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws; Articles 9, 9a, 9b, 9c and 9d Decision 2002/187/JHA on Eurojust.

[12] Cf. Article 12 Reg. 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws; Article 16 Directive 2010/24 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures; Articles 22 and 23 Regulation 655/2014 on a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters. A Preservation Order can be issued when «there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult» (Article 7 § 1 Regulation 655/2014). The creditor may also request the competent court to request that the authority of the Member State of enforcement obtain the information necessary to allow the bank(s) and the debtor's account(s) to be identified (Article 14 § 1). The Preservation Order «shall be enforced in accordance with the procedures applicable to the enforcement of equivalent national orders in the Member State of enforcement» (Article 23 § 1). Regulation 655/2014 does not apply to social security and «claims against a debtor in relation to whom bankruptcy proceedings, proceedings for the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions, or analogous proceedings have been opened» (Article 2).

4. *Collaboration vs. Competition*

As clarified in Agustín Menéndez's essay, currently internal market regulation boosts the *regime competition* among Member States[13]. In particular, ECJ case law has allowed the incorporation of letterbox companies (ECJ, 9.3.1999, C-212/97, *Centros*; 25.10.2017, C-106/16, *Polbud*) that can then provide their services in the internal market, benefiting from the prohibition of measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty (ECJ, 30.11.1995, C-55/94, *Gebhard*, § 37). In 2014, the European legislator has clarified that Article 56 TFEU cannot be applied to workers posted from a letterbox company. Moreover, posting of workers regulation applies only in case of temporary posting (Article 4 Directive 2014/67). However, the Host State can verify if the posting company performs a real economic activity in the Home State and if the posting is temporary, only cooperating with the Home State.

This is one of the many antinomies of the internal market regulation[14]: on the one hand, the *regime competition* between the Member States is encouraged; on the other hand, transnational cooperation is invoked to prevent economic freedoms from being misused. But why should the States winning the *regime competition* collaborate with others, thus losing their comparative advantage? And above all, why should the States winning the *regime competition* in the area of freedom of movement collaborate with other States which, by imposing the rules of monetary union and economic governance, obtain a comparative advantage in the export of their goods? And again, why should States forced to reduce their public spending use the scarce resources available (e.g. the few labour inspectors) to investigate violations (often very complex) from which they would not get anything?[15]

---

[13] Giubboni S. - Orlandini G., *Mobilità del lavoro e dumping sociale in Europa, oggi*, in *Giorn. dir. lav. rel. ind.*, 2018, p. 907; Vasquez F., *Entre concurrence et coopération: Europe sociale ou protection par les États?*, in *Revisiter les solidarités en Europe*, Actes du Colloque, 18 et 19 juin 2018, Chaire État social et mondialisation: analyse juridique des solidarités, Professeur Alain Supiot, p. 73; Rodière P., *Quelles refondations sociales en perspective?*, in *Revisiter les solidarités en Europe*, Actes du Colloque, 18 et 19 juin 2018, Chaire État social et mondialisation: analyse juridique des solidarités, Professeur Alain Supiot, p. 173.

[134] Christodoulidis E., *Social Rights Constitutionalism: An Antagonistic Endorsement*, in *Journal of Law and Society*, vol. 44, n. 1, 2017, p. 134.

[15] Borelli S., *La direttiva 2018/957 sul distacco dei lavoratori: ancora un passo in avanti verso il diritto comunitario del lavoro?*, in *Lavoratori e cittadini. Dialoghi sul diritto sociale*, Il Mulino, 2019; Sørensen K.E., *The fight against letterbox companies in the Internal Market*, in *Comm. mark. law rev.*, 2015, p. 113.

Moreover, the EU regulation on the coordination of national social security systems is currently «incapable of sufficiently persuading Member States to cooperate with due diligence, as there are no satisfactory responses when they refrain from doing so»[16]. Indeed, the State that issues the A1 PD[17] receives social contributions until it withdraws it (i.e. the A1 PD is binding for the Host State: see Article 5 Regulation 987/2009); if it is required to withdraw the A1 PD, the State has to investigate in order not to receive social contributions anymore; and Member States are aware that, in case of violation of the duty to cooperate, no infringement procedures have so far been started. Many studies have pointed out the ineffectiveness of these rules, especially if compared to other fields, such as taxation[18]. However, it should be noticed that cross-border cooperation among Member States works well in the context of taxation law because the problem of double (or multiple) taxation does exist[19]. Instead, the EU regulation on coordination of national social security systems, applying the principle of a single applicable legislation, has eliminated (or reduced) the problem of double social contribution.

In order to facilitate cooperation between Member States, ELA can coordinate and support concerted and joint inspections[20]. Social partners

---

[16] Jorens Y. - Lhernould J.P., *Procedures related to the granting of Portable Document A1: an overview of country practices*, FreSsco, 2014, p. 39. On the issuing of A1 PD see Giubboni S., *The new European Labour Authority and social security coordination. Some preliminary remarks*, cit., p. 525.

[17] An A1 PD (portable document) is a document that proves the worker's registration to the social security system in the Home State.

[18] *Transnational posting of workers within the EU. Guidelines for administrative cooperation and mutual assistance in the light of Directive 2014/67/EU*, cit., p. 29; Fernandes S., *What Is Our Ambition For The European Labour Authority?*, Jacques Delors Institute, Policy Paper No. 219, 2018, p. 5-7; Jorens Y. - Lhernould J.P., *Procedures related to the granting of Portable Document A1: an overview of country practices*, cit., p. 38; van Hoek A. - Houwerzijl M., *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, cit., p. 161 ff.; Giubboni S. - Iudicone F. - Mancini M. - Faioli M., *Coordination of Social Security Systems in Europe*, study for the European Parliament's Committee on Employment and Social Affairs, 2017, p. 67ff.

[19] Spiegel B. (ed.) - Daxkobler K. - Strban G. - van der Mai A.P., *Analytical report 2014. The relationship between social security coordination and taxation law*, FreSsco, 2015, p. 20; Traversa E., *A Hunters Game: How Policy can change to spot and sink Letterbox-type Practices*, ETUC Project on Letterbox Companies, Part III, 2016, p. 94.

[20] «Concerted inspections are inspections carried out in two or more Member States simultaneously regarding related cases, with each national authority operating in its own territory, and supported, where appropriate, by the staff of the Authority». «Joint inspections are inspections carried out in a Member State with the participation of the national authorities of one or more other Member States, and supported, where appropriate, by the staff of the Authority» (Article 8 § 2 of ELA Regulation).

at national level may bring cases to the attention of the Authority (Article 8 § 2 of ELA Regulation). ELA's role is mainly one of back-office coordination of operations, since it shall provide conceptual, logistical and technical support, legal expertise, translation and interpretation services (Article 9 of ELA Regulation). The Advisory Group on ELA has also recommended ELA to produce «draft manuals, working arrangements and model agreements for concerned and joint inspections»; ELA should also provide a «certain follow-up system to inspections, including a report template, the exchange of data, and a monitoring system for the execution of possible penalties».

ELA's competences are however subject to several limits. First, ELA cannot launch a concerted or a joint inspection on its own initiative, but it can only « suggest to the authorities of the Member States concerned that they carry out a concerted or joint inspection» (Article 8 § 1 of ELA Regulation). If, in the course of concerted or joint inspections, or in the course of its activities, ELA «becomes aware of suspected irregularities in the application of Union law», it may report to the Member State concerned and to the Commission[21]. Moreover, «in the event that one or more Member States decide not to participate in the concerted or joint inspection, the national authorities of the other Member States shall carry out such an inspection only in the participating Member States» (Article 8 § 3 of ELA Regulation)[22]. The State that has refused a concerted or joint inspection shall inform the Authority and the other States «of the reasons for its decision and possibly about the measures it plans to take to solve the case» and the outcomes of such measures; the Authority may also suggest to the State that refuses concerted and joint inspections to «carry out its own inspection on a voluntary basis» (Article 8 § 4 of ELA Regulation). Twice a year, the Authority shall report to the Management Board, in which European social partners are represented, information on concerted and joint inspections, including their refusals by Member States (Article 9 § 8 of ELA Regulation).

However, the Authority does not have any sanctioning power, since the Commission only can start an infringement procedure against a State.

[21] Differently, the European Banking Authority, has the power to investigate on the violation of EU law on its own initiative or upon the request of qualified actors (cf. Article 17 of Regulation 1093/2010 establishing a European Supervisory Authority (European Banking Authority) (Cremers J., *The European Labour Authority and Enhanced Enforcement*, EP Briefing, 2018).

[22] Differently, Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws establishes a limited set of reasons for declining to take part in coordinated actions (Article 18).

Neither is the possibility for national authorities to report to ELA on infringements of the duty of cooperation by a Member State explicitly regulated (this possibility is regulated by Article 28, § 8 Directive 2006/123 on services in the internal market). As already mentioned, the Commission has so far not shown to be prompt to act against States that violate their general duty to sincere cooperation and the specific duties established by the Enforcement Directive on posting of workers (Directive 2014/67) and the Regulation on the coordination of social security systems. Moreover, in the Commission's *Report on the application and implementation of Directive 2014/67/EU* (COM(2019)426), there is neither a concrete analysis on the fulfilment of the States' obligations to cooperate, nor an evaluation on the effectiveness and adequateness of national inspections.

Following the ECJ decision in *Altun* (6.2.2018, C-359/16), the State's refusal to cooperate could be relevant to apply the principle of prohibition of fraud and abuse of rights[23]. According to the ECJ, the court of the Member State to which the workers have been posted can disregard the A1 certificates (i.e. the certificates that declare the application of the Home State's social security law)[24] when the Host State institution puts before the institution that issued these certificates concrete evidence suggesting that these certificates were obtained fraudulently, and the latter institution fails to withdraw them. In this case, therefore, the Host State institution can demand the employer to pay social contribution according to its national law.

The problem is that often, in order to gather evidence, the collaboration of the State of origin is necessary. In the *Altun* case, it was clear that the Bulgarian companies were letterboxes and that the Belgian company, instead of directly hiring its workers, contracted out its construction work to Bulgarian companies that posted workers in Belgium. In many cases, however, in order to understand what has really happened, it is necessary to have access to the information that results from the business register, the bank account(s) and the financial declarations of the

[23] Rodière P., *Le droit européen du détachement des travailleurs: fraudes ou inapplicabilité?*, in *Dr. soc.*, 2016, p. 598; Müller F., *Effectivité des droits des salariés détachés: quelle contribution à la lutte contre la concurrence sociale déloyale?*, in *Dr. soc.*, 2016, p. 630 and *La révision des règles en matière de détachement: l'heure des choix en droit du travail et droit de la sécurité sociale*, in *Rev. trim. dr. eur.*, 2018, p. 75.

[24] The procedure for issuing and withdrawing the A1 form guarantees the principle of a single applicable legislation. As stated by the ECJ, this procedure responds more to the need to facilitate the transnational provision of services than to the need to guarantee workers' right to move freely within the Union (ECJ, 10.2.2000, C-202/97, *FTS*).

companies involved; it is also necessary to collect testimonies from customers, suppliers and workers, and to check the social security contributions paid.

It should also be considered that not all labour inspectorates have the same operational capacity as the Belgian ones and can afford transnational investigations such as the one conducted in the *Altun* case. And, as already said, the constraints on public expenditure have a negative impact on the effectiveness of the controls, limiting the resources available for this purpose. Moreover, transnational investigations are lengthy and emphasise the risk of remaining empty-handed, due to the impossibility to implement precautionary measures without the collaboration of the Home State.

The ECJ should take into consideration the State's refusal to cooperate in fighting transnational fraud and abuse also in the evaluation of the sanctions imposed by the Host State. In fact, difficulties in investigating on transnational fraud and abuse should justify higher sanctions; otherwise, the former could reduce the dissuasiveness of the latter. However, the recent ECJ case law on the proportionality of sanctions is not at all encouraging on this point (see ECJ, 13.11.2018, C-33/17, *Čepelnik*; 12.9.2019, joined cases C-64/18, C-140/18, C-146/18 and C-148/18, *Maksimovic*). Similarly, the difficulties in cooperating with the Home State should be taken into consideration in the evaluation of the measures implemented by the Host State to control the business model of the posting enterprise (for a different perspective see the Opinion of the Advocate general in *Dobersberger*, 29.7.2019, C-16/18).

Another possible way to remedy to States' violations of the duty of sincere cooperation could be the mediation procedure provided by Article 13 of the ELA Regulation. However, ELA can adopt only non-binding opinions (Article 13 § 1 of ELA Regulation). Moreover, the participation of the Member States in the mediation is voluntary (Article 13 § 7 of ELA Regulation). Therefore, the shortcomings presented by the conciliation procedure run by the Administrative Committee for the coordination of social security systems will probably occur also for ELA mediation.

Once again, it is clear that the effective functioning of ELA depends mainly on which way the EU integration will go, i.e. in which way the antinomy between States' cooperation and States' competition will be solved, having in mind that European integration should be a « process of creating an ever closer union among the peoples of Europe» (Article 1 TUE).

AUTORI E AUTRICI

Eugenia Bartoloni
Professoressa di Diritto dell'Unione europea nell'Università della Campania "L. Vanvitelli"

Silvia Borelli
Professoressa associata di Diritto del lavoro nell'Università degli studi di Ferrara

Francesco Costamagna
Professore associato di Diritto dell'Unione europea nell'Università di Torino e Affiliate presso il Collegio Carlo Alberto

Andrea Guazzarotti
Professore associato di Diritto costituzionale nell'Università degli studi di Ferrara

Agustín José Menéndez
Professore di Diritto pubblico e Filosofia del diritto nell'Universidad Autónoma de Madrid

Marc Morsa
Ricercatore nell'Université Catholique de Louvain, Consulente sulla strategia internazionale e Responsabile legale nel Dipartimento di Relazioni Internazionali del Servizio pubblico federale belga della sicurezza sociale

Giovanni Orlandini
Professore associato di Diritto del lavoro nell'Università degli studi di Siena

PUBBLICAZIONI DEL DIPARTIMENTO DI GIURISPRUDENZA DELL'UNIVERSITÀ DEGLI STUDI DI FERRARA - SEDE DI ROVIGO

1. A. PUGIOTTO (a cura di), *Per una consapevole cultura costituzionale. Lezioni magistrali* (2013), pp. XII-612.
2. AA.VV., *Studi in onore di Luigi Costato* (2014), 3 voll.
3. A. ANNONI - A. THIENE (a cura di), *Minori e privacy. La tutela dei dati personali dei bambini e degli adolescenti alla luce del Regolamento (UE) 2016/679. Atti del convegno rovigo 22 novembre 2018* (2019), pp. VIII-152.
4. S. BORELLI - A. GUAZZAROTTI (a cura di), *Labour Mobility and Transnational Solidarity in the European Union* (2019), pp. VI-162.

Finito di stampare
nel novembre 2019
PL Print - Napoli