



The Institutional Design of the European Labour Authority: A Critical Appraisal

DI DANIELE GALLO^{1*}

1. Preliminary remarks and outline of the intervention

Few preliminary remarks. First of all, I will not venture into substantive EU social/labour law matters. Secondly, I will not put ELA in context in the frame of the so-called ‘agencification’ process.

What I will do is to delve into the structure of ELA as foreseen in the Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority (ELA), as well as in the way how, within its governance, ELA performs its activities.

To this end, I will focus on 5 issues: governance and role of stakeholders; access to information; cooperation with MS; engagement with other EU bodies; mediation.

2. Governance and role of the stakeholders

ELA’s administrative and management structure comprises, as for the great majority of EU agencies, the following bodies: a) A Management Board that ensures strategic orientation and oversees ELA activities; b) an Executive Director, who is ELA’s legal representative and is responsible for the day-to-day management of ELA; c) a Stakeholders Group, composed by 2 representatives of the Commission and 10 representatives equally representing trade union and employer organisations and that may submit opinions to ELA, upon request or on its own initiative. As to such advisory power, it fits well into the development brought about first and foremost by the three supervisory authorities within the European system of financial

^{1*} Jean Monnet Chair; Full Professor of EU Law, Law Department, Luiss University; *Professeur invité, Université Panthéon Assas*. This contribution is the written version of the speech delivered on 1 December 2020 at the MoveS Webinar “The European Labour Authority One Year After. A Multidisciplinary Dialogue” organized by Professor E. Ales, national expert at MoveS, and by Professor B. Mattarella, Director of the Luiss *Centro di ricerca sulle Amministrazioni Pubbliche “Vittorio Bachelet”*. MoveS is a European Commission (DG EMPL) funded network of independent experts in the fields of free movement of workers (FMW) and social security.

supervision (European Banking Authority EBA, European Securities and Markets Authority ESMA, European Insurance and Occupational Pensions Authority EIOPA).

With regard to the role of non-state stakeholders, I see an important aspect and, if I am not mistaken, a major novelty, a unique feature of ELA compared to other authorities.

I am referring to the involvement of stakeholders not only within the Stakeholders Group, but also at the level of the highest body of ELA which lies at the core of ELA's decision making, that is in the Management Board. As a matter of fact, in the Board, besides one component from each Member State (MS), two members representing the Commission and one independent expert appointed by the European Parliament, there are 4 members, representing cross-industry social partner organisations at Union level, equally representing trade union and employer organisations. Their role cannot be neglected by any means.

This is a positive evolution inasmuch as such great contribution on the part of non-State actors implicated in industrial, social and welfare matters is crucial for the proper functioning of the Agency. It is crucial for ensuring that the Agency will operate in practice and may be steered also by those actors who operate, on the field, and have – so to speak – a concrete understanding of what is going on in terms of labour mobility. The fact that businesses and trade unions are equally represented makes sure that the stakeholder's involvement will not be biased towards business groups, leading to a kind of regulation guided by private rather than public interests.

3. Access to information

By reading Art. 5 of the 2019 Regulation, compared to the other decentralized agencies dealing with labour mobility in the EU (European Foundation for Living and Working Conditions, European Agency for Safety and Health at Work, European Centre for the Development of Vocational Training, European Training Foundation), I do see access to information as an essential tool for allowing individuals and employers, in particular SMEs, to benefit from the full potential of the internal market by getting them informed about their rights and obligations. Indeed, the rationale is that if Europeans are made aware of the rights which they have and the jobs opportunities available to them elsewhere, they would be encouraged to put into action their rights and, of consequence, contribute to the project of EU integration. It is a sort of unprecedented and atypical kind of private enforcement of EU law in a very sensitive field as the one on welfare.

The Authority, in order to facilitate access to information, shall coordinate the European Coordination Office of the European Network of Employment Services (EURES) and, of course, shall facilitate cooperation and the exchange of information between MS. In this respect, I simply observe that the cooperation between MS is grounded in basically all secondary legal acts in force governing social security coordination and posting workers that endow national authorities with a number of important tasks, including first and foremost Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers. This directive, actually, imposes an obligation upon MS to designate domestic bodies that shall provide information, guidance and assistance to individuals and employers in the area of labour mobility. In this regard, it is of great importance that ELA mandates a cooperative relationship amongst all these national bodies.

4. Cooperation with MS

Third issue and a further key function of ELA is cooperation with MS.

The question is: What are the other obligations of assistance upon ELA, besides access to information?

a) Coordinating and supporting MS' action for enforcing EU free movement law. This means: to undertake and coordinate concerted and joint inspections by ELA, on the one hand, and competent national authorities, on the other hand. 'Concerted inspections' are those undertaken by two or more MS regarding related cases, while 'joint inspections' are those carried out in a single MS with the participation of the national authorities of one or more other MS.

What we can draw from this role of ELA is that it shall act as watchdog for the compliance with EU law, as demonstrated by the fact that ELA is also empowered to report any irregularities in the application of EU law to both the concerned MS and the Commission. In this respect I do see an important novelty: while the reporting before the Commission does occur in other agencies, the reporting made (also) to the MS is a new development.

b) A second area of cooperation with MS concerns labour mobility analyses and risk assessment. This is achieved via a number of instruments, including conducting peer reviews among MS in order to improve the application and enforcement of EU free movement law. In this connection, ELA shall inform the Commission, the EP and the MS of its findings. Here I do see a further novelty inasmuch as, unlike other authorities where MS are involved only in the initial stage of the analysis and assessments, within ELA MS are involved also at a later stage since they are the addressees, along with the Commission, of such studies.

c) Third area of cooperation is capacity building, ranging from developing non-binding guidelines and training programmes to exchanging dissemination of best practices.

d) Fourth area: establishment of a European Platform to enhance cooperation in tackling undeclared work (arts 12 and 16).

What is the takeaway on the cooperative interaction between ELA and MS?

Unlike other authorities, MS are very much involved. This is the result of the scope of intervention of ELA. It is the result of the nature of the problems at stake, that is MS' socio-economic sovereignty implied in labour mobility choices and regulation.

5. Cooperation between ELA and other EU institutions and bodies

Fourth issue I would like to focus on relates to the cooperation between ELA and other EU institutions and bodies. It is underlined several times in the Regulation and explicitly stated in its Art. 14 that ELA shall cooperate, not only with the European Commission's Directorate-general for Employment, Social Affairs and Inclusion, but also with a variety of EU agencies and specialized bodies who are active in the field of social security coordination. In this respect, I do see a problem for ensuring a sufficient degree of coordination as much as the engagement with the specialized bodies within the new institutional set-up is concerned.

I wonder how in practice a speedy and constructive collaboration could be achieved in regards to two layers of collaboration where I do find, actually, significant risks of overlap. The first regards two committees that provide a forum for the consultation of social partners and government representatives at national level: the Advisory Committee for the Coordination of

Social Security Systems (Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems) and the Advisory Committee on the Free Movement of Workers (Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union). In the Regulation it is laid down a proper obligation for ELA to contribute to their work and participate in their meetings.

The second layer of collaboration that, in my opinion, may raise concerns, is the one with the Administrative Commission, i.e., with the most relevant body (until the creation of ELA) in charge of social security coordination, that was established with Regulation 883/2004. In this regard, the 2019 Regulation does not explicitly provide for the conclusion of a cooperation agreement with the Administrative Commission. While not providing for the conclusion of such agreement, in the Regulation it is boldly affirmed the need to secure a close cooperation and avoid duplication with such specialized body. The problems are twofold.

a) First problem: a convergence in the carrying out of the tasks to be performed by both ELA and the Administrative Commission could be difficult to reach if we consider the different composition of the two bodies. Indeed, I simply recall that, while within ELA the European Parliament, the European Commission and stakeholders are all involved, as much as the Administrative Commission is concerned, the involvement of the European Commission is envisaged only in its advisory capacity and secondly there is no role neither for the European Parliament nor for stakeholders.

We have thus two bodies with a distinct character for governing a decentralised domestic system of enforcement of social security regulations: intergovernmentalism in the Administrative Commission, on one hand, and, on the other, a much more supranational design for ELA. I wonder whether the replacement of a single supervisory power - which had been assigned to the Administrative Commission until 2019 - by the unbundling of competences between this body and ELA, could actually work notwithstanding the differences in composition of the two bodies.

b) A second problem I do see with regard to the interaction of ELA with the Administrative Commission is that we have two bodies entrusted with very similar tasks. To name a few, think of the following four: disseminating information for businesses and workers; exchanging experience and best administrative practices; fostering cooperation between MS in social security matters; making proposals to the European Commission concerning the coordination of social security schemes.

Now, especially for regulatory tasks entailing decisions on interpretative questions arising in the context of social security coordination, not merely operational tasks, the new set-up might create overlaps and a quite jumbled and muddled mechanism.

The clashes are even more risky regarding the mediation function performed by ELA. Indeed, in the 2019 Regulation it is established that ELA should carry on its mediation role “without prejudice to the competence of the Administrative Commission”. On this matter, I move now to the fifth and last point I would like to discuss about ELA.

6. Mediation

In the 2019 Regulation it is emphasized that, first, ELA has a mediation role, second, can issue non-binding opinions and, third, shall report to the European Commission about the lack of enforcement on the part of a MS.

It is clarified that MS refer individual cases to the Authority for mediation after failing to solve them by means of direct contact and dialogue. Mediation should only concern disputes between MS, while individuals and employers should continue to have at their disposal the national and EU services dedicated to dealing with such cases, such as the SOLVIT network, to which the Authority must refer those cases. I would like to raise two points in this respect.

a) MS' participation is voluntary as it happens in the frame of other agencies. Of course, it remains to be seen whether mediation, that shall be performed by a Mediation Board composed of experts from MS other than those that are party to the dispute, de facto, could become the rule every time a dispute between MS arises on the application and enforcement of EU free movement law. If the experience of other agencies will be replicated, the strength of such instrument may lose much of its weight.

b) An additional point I had previously anticipated: a complex problematic aspect about mediation concerns the relationship between ELA and the Administrative Commission.

The Regulation states that when a dispute relates, fully or in part, to matters of social security, the Authority shall inform the Administrative Commission and, upon request of the latter and in agreement with the MS party to the dispute, the Authority shall refer the issue concerning social security to the Administrative Commission, while issues not concerning social security will be settled under the ELA's mediation mechanism.

On one hand, the fact that mediation does not disappear within the Administrative Commission is welcome since, as clarified even by the ECJ in a number of cases (e.g., 2/05 *Herbosch Kiere*), the conciliatory role of the Administrative Commission in cases concerning the applicable social security legislation prevents disputes from lasting too long and from aggravating the interstate conflict. On the other hand, I wonder if and to what extent, in this area as well as in the other areas mentioned earlier supra, § 5, it could be possible to prevent overlaps between ELA and the Administrative Commission, with the ultimate result of undermining the role of both bodies.

7. Conclusion

ELA is one of the novelties that were introduced as result of the European Pillar of Social Rights, i.e., a landmark recent development in the Single Market's social dimension. It is an attempt to regulate the consequences of contemporary globalization and legally frame socio-economic transformations. *Dare un ordine giuridico al mercato*, Natalino Irti would say.

Whether ELA will develop toward an effective enforcer of EU labour law will depend on the extent to which the non-binding norms it establishes are followed in practice. It will depend, thus, on whether soft-Europeanisation in a very sensitive area - at the crossroads between European integration and national social sovereignty - could succeed.

On one hand, much of the powers of ELA seem to enhance and build upon the existing powers of the MS through cooperation. On the other hand, ELA does present some important novelties, including the enhanced role of stakeholders, the establishment of joint and concerted inspections, the improvement of access to information for individuals and employers, as well

as the greater involvement of MS and EU institutions different than the Commission, like the European Parliament.

Several problems still exist: first and foremost the coordination with other specialised bodies with similar portfolio and scope of manoeuvre, including the Administrative Commission.

Of course, we are at the beginning of a journey, a journey that was and still is endangered by the covid outbreak. We will see what the future holds for ELA. Before jumping in with tough criticism, at least a few years - not only one - of functioning shall be considered.