

# STRENGTHENING THE MANDATE OF THE EUROPEAN LABOUR AUTHORITY

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## SUMMARY

The creation of the European Labour Authority (ELA) is an effort to enhance control over and enforcement of the working conditions of migrant workers who cross the border into the EU. This contribution reflects on some of the shortcomings that have been there from the start, in terms of both the ELA's competences and the missing links with other, sometimes more determinant policy areas in the single market, such as freedom of establishment and free service provision with posted workers. This is especially relevant for third-country nationals recruited to work inside the EU. Enforcing working conditions and tackling bogus practices involving posted third-country nationals inside EU territory should be part of the ELA's work.

## ABOUT THE AUTHOR

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## INTRODUCTION

In September 2017, the then acting president of the European Commission, Jean-Claude Juncker, paved the way for the creation of a new European institution to be charged with the control and enforcement of the labour standards and working conditions of mobile migrant labour.<sup>1</sup> Juncker declared that it is 'absurd to have a Banking Authority to police banking standards, but no common Labour Authority for ensuring fairness in our single market'. The adoption of Regulation (EU) 2019/1149 led to the establishment of the European Labour Authority (ELA) as a decentralised operational agency. The founding Regulation is clear about the competences of the ELA. The Authority is supposed to ensure fair and effective labour mobility across the EU and to assist Member States and the European Commission in coordinating social security systems in the EU.<sup>2</sup> After an inauguration ceremony in October 2019, the ELA became operational from 2020. Although this coincided with the Covid-19 pandemic, which proved a major obstacle to its operational launch, the general observation is that the ELA has functioned well.<sup>3</sup>

If it is to be even more effective, however, some serious shortcomings must be tackled, in terms of both ELA competences and the missing links with adjacent policy areas and single market principles, such as freedom of establishment and free movement of services, that directly interfere with workers' mobility. The creation of the single market in the mid-1980s has led to an opening up of national markets for products and goods, finances, services and workers, while freedom of establishment makes it easier to start businesses across borders. The single market provides a fertile breeding ground

- <sup>1</sup> In this contribution mobile migrant labour stands for EU-citizens and third-country nationals that cross-borders inside the EU for their work. Their intra-EU mobility can be based on the free movement, posting of workers rules or on other temporary schemes.
- <sup>2</sup> The webpage Corporate Documents on the ELA-website provides annual reports and work programs. For the key tasks see: <https://www.ela.europa.eu/en/about/who-we-are>
- <sup>3</sup> For an evaluation of ELA's operational functioning, see, for instance, the Belgian Presidency report: [https://belgian-presidency.consilium.europa.eu/media/nvenvc42/report\\_ela\\_eu2024be.pdf](https://belgian-presidency.consilium.europa.eu/media/nvenvc42/report_ela_eu2024be.pdf)

for intensified provision of services with posted workers, for (temporary) labour mobility and for the recruitment of workers across the EU. However, the mandate of national compliance and enforcement authorities to verify and control the true character of such mobility faces an array of constraints and problems, and compliance control with regard to rights-based mobility is hampered. This is not least because the legal capacities of national institutions (competent for income related taxes, social security contributions, pay and working conditions) are limited to national territories, ending at the border.

In recent decades, enforcement authorities and NGOs have signalled the growing presence of third-country national migrant labour working as posted workers in EU Member States. Such third-country nationals tend to be extremely vulnerable because their legal residence status (and their entrance into EU territory) depends on their employment status. This results from the interaction of immigration pathways in national immigration law and labour market access and enforcement of labour standards in the particular country in which third-country nationals end up working. It is important to enforce their rights just like any other mobile workers and this should be within the scope of the ELA's operations (Vancauwenbergh et al. 2023; Cremers 2024).

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## SHORTCOMINGS OF THE REGULATION

### THE FOUNDING ELA REGULATION HAS A NUMBER OF SHORTCOMINGS.

One fundamental problem is the Authority's dependence on the 'good will' of Member States, as reflected in various non-binding aspects and limitations. Joint inspections are subject to the agreement of the Member States concerned and participation is voluntary. Cooperation is formulated in rather permissively (including in cases of mediation, which can be used in case of disagreement).<sup>4</sup> Mediation opinions formulated jointly and adopted by common agreement are non-binding, and if Member States subsequently take no action, there is hardly any 'comply and explain', as in other parts of the *acquis* dealing with the four freedoms (goods and products, capital, persons, and services).<sup>5</sup>

Furthermore, the mandate applying under the aegis of joint inspections is insufficiently regulated. Participants in joint inspections do not have a full, EU-wide mandate to act and ELA staff participation always requires the consent and prior

agreement of the Member State on whose territory they will be providing their assistance. The ELA has no or only a weak mandate to initiate action. It is up to Member States to assign an appropriate role and status to officials from other Member States and ELA staff, in accordance with the law or practice of the Member States in which the inspection takes place. In many cases, foreign colleagues have only observer, guest or tourist status.<sup>6</sup>

Evidence resulting from cross-border enforcement actions does not (always) have the same legal value as evidence obtained from national investigations (only 14 countries allow this). What's more, the imposition of national financial penalties is not guaranteed. Article 9.7 of the founding Regulation says that it shall be possible to use 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 those Member States. The Regulation stops halfway, however, and EU-wide authorisation and legitimisation are lacking. There is no EU-wide mandate, comparable to the competence in joint activities of other EU authorities (for instance, powers of inspection and coordinated actions around antitrust or consumer protection). National compliance authorities that carry out their duties jointly should be empowered EU-wide to conduct all necessary inspections of undertakings and related investigations.

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## SHORTCOMINGS RELEVANT FOR THIRD-COUNTRY NATIONALS RESULTING FROM A 'NARROW' SELECTION OF THE ACQUIS

Other shortcomings with an impact on mobile migrant labour, and especially third-country nationals, stem from a too narrow selection of the applicable legal instruments. Dealing with mobile migrant labour often leads to spillover effects.

### SPILLOVER TO MIGRATION LAW/THIRD-COUNTRY NATIONALS ON THE LABOUR MARKET

The labour market entry of third-country nationals is a national competence based on migration policies formulated by individual Member States. Member States decide autonomously on recruitment and entry, based on a points systems or national quota, company 'sponsorship', (bilateral) agreements with preferred and dedicated countries or schemes aimed at high-skilled workers, such as the EU Blue Card. This was one reasons ELA involvement was withheld. Once inside the EU, however, enforcement and the tackling of bogus practices affecting posted third-country nationals correlate with labour law, and the freedom to provide services ties significantly with

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<sup>4</sup> Other EU-authorities have a much stronger mandate, with obligatory cooperation and mutual assistance. For instance, Regulation 1093/2010, settling the European Banking Authority (EBA), states (in article 35) that the competent authorities of the Member States shall, at the EBA-request, provide the EBA with all necessary information to perform its duties. Cooperation is obligatory and the EBA is empowered to require the competent authorities concerned to take specific action or to refrain from action to ensure compliance with EU-law, with binding effects for the competent authorities concerned.

<sup>5</sup> The European Banking Authority has a legally binding mediation role to resolve disputes between competent authorities, next to a non-binding mediation procedure.

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<sup>6</sup> To give another example that is more outspoken: Regulation EU 2017/2394 on consumer protection laws settles the cooperation between national authorities responsible for enforcement. Where there is a reasonable suspicion of a widespread infringement, competent authorities have a series of obligations resulting in coordinated investigation and enforcement actions (Chapter IV of that Regulation).

migration law and illegality. This correlation of EU rules on labour mobility and labour migration, calls for an extension of the ELA's scope, also because no other EU agency is dealing with labour migration from outside the EU and the labour and social security rights of the workers involved. The European Parliament has underlined that the ELA should be empowered to address the situation of third-country nationals (European Parliament 2024). For instance, the Seasonal Workers Directive (2014/36/EU) and the Employers Sanctions' Directive (2009/52/EC) should be included in the scope of the ELA.

### DIRECT LINK TO NON-GENUINE UNDERTAKINGS, 'FAKE' POSTINGS AND THE USE OF ARTIFICIAL ARRANGEMENTS (LETTERBOX COMPANIES)

As the posting of workers within the framework of the free provision of services is important for intra-EU mobility in general and the only opportunity for third-country nationals to work outside the country of entry, the terms of cooperation are enshrined in the Services Directive to ensure that action can be taken in cases of serious question marks about the genuine character of the service provision. Directive 2006/123/EC formulates binding obligations in Articles 28 to 36 and provides detailed information on obligatory mutual assistance and the authority to inspect, with supervisory tasks being carried out in the Member State of establishment and the Member State in which the service is provided. The Directive contains alert mechanisms and the notion of a good reputation. The word 'shall' is constantly used to stress the obligatory nature of mutual assistance. However, neither the core articles of the Services Directive nor the posting rules specify strict requirements that can determine the genuine character of corporate entities acting as service providers in a cross-border context. Compliance offices still lack the competence to act effectively and thoroughly against non-genuine entities or to act on the basis of company law, free service provision and freedom of establishment (Cremers 2020a).

### THE LACK OF A COMMON AND EU-WIDE SANCTIONS POLICY

The EU *acquis* provides neither a direct remedy such as the deregistration, withdrawal or winding up of non-genuine undertakings or service providers, nor for effective or dissuasive sanctions against the abuse of artificial corporate entities functioning as service providers in a cross-border context. Sanctions and penalties in this framework are symbolic in nature and have no EU-wide effect. Social offences are still not considered an 'economic delict', and victims are up against it in most countries to find redress and compensation. This entails the risk that in cases of abuse involving third-country nationals more attention is paid to the 'illegal' status of the worker – with the risk of deportation – than to protecting the workers and effective handling of the offender.

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## RECOMMENDATIONS

The positive aspects of the European Labour Authority – enhanced enforcement, the effort to put an end to dispersed compliance control, the promotion and facilitation of joint inspections and investigations across different disciplines – all stand (Cremers 2020b). In the meantime – despite the interruption due to the Covid-19 pandemic – concerted joint action on national compliance and enforcement authorities tackling fraudulent practices with cross-border labour mobility have become a core ELA activity. But more needs to be done.

The combined tasks related to cross-border labour mobility and the coordination of social security should be complemented with legislative areas not yet covered, such as the tackling of artificial arrangements (such as letterbox companies) and the transnational cooperation and fight against fraudulent service providers. Furthermore, it must be settled that the national authorities involved may use as evidence any certified information, documents, findings, statements or intelligence communicated, on the same basis as similar documents obtained in the relevant Member State. Moreover, the ELA should be tasked with working towards an EU-wide effective and dissuasive sanctions policy (based on Articles 81 and 82 TFEU), comparable to existing EU-wide sanctions in other areas of the *acquis*, which can lead to a suspension or cessation of fraudulent cross-border activities and service provision. Such an EU-wide regulatory framework would put enforcement policy on mobile migrant labour on an equal footing with control and enforcement of free movement of capital and products.<sup>7</sup>

Migration law does not fall under ELA competence. When enforcing and tackling abuse involving posted third-country nationals inside EU territory, however, there is a direct correlation between labour law and free provision of services, on one hand, and migration law and illegality on the other. This intertwining of EU rules on labour mobility and labour migration calls for an extension of the scope of the ELA. This is also why the European Parliament argues that the ELA should have more power to address the situation of third-country nationals. The scope in this area is too narrow. For example, the enforcement instruments that can be derived from the Seasonal Workers Directive (2014/36/EU) and the Employer Sanctions Directive (2009/52/EC) should be included.

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<sup>7</sup> Regulation EU 2017/2394 on the enforcement of consumer protection, contains provisions for the cessation of illegal practices by operators in one territory who target consumers in other Member States and refers to measures that can 'bring about the cessation or prohibition' of intra-EU infringements.

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