

# Concerted inspections in the road transport sector: which role for the European Labour Authority?

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1. Preliminary remarks. 2. The road transport sector: a peculiar sector. 3. New rules for road transport operators: The Mobility package I and the concerted inspections. 4. The relevant challenges for the European Labour Authority in the field of concerted road-side checks. 5. Final remarks.

## Abstract

The Mobility Package assigned the coordination and the support of such transnational inspections to the European Labour Authority, the European Agency aimed at ensuring that EU rules on labour mobility and social security coordination are enforced in the internal market. Such investiture is a unicum in the entire EU legislation because there is no other economic sector in which the EU imposed transnational inspection under the ELA's coordination. An action that the ELA has recently started to put in practice with the first joint inspections in EU alongside its involvement in the fight of undeclared work, a phenomenon that occurs in road transport in terms of non-declaration of working status, rests or through "envelope wages" to reduce costs. The challenge for ELA is not simple due to the different nature, fragmentation and experiences of national Labour Inspectorate and to the lack of enforcement power against them in case of refusal for administrative cooperation: a problem that is neither easy to be solved even considering the sincere cooperation principle among Member States according to art. 4 TEU. The paper will start from an analysis of the road transport sector and its relevance. The analysis will be conducted starting from a definition of the problem, related to the social frauds and illegal practices experienced by drivers, and the amendments made by the Mobility package I in the EU drivers' legislation. Lastly, the role of the European Labour Authority, its nature and competencies, will be deeply developed with regards to its involvement in the road transport sector and the outcomes of the joint inspection. A role of coordination of Labour Inspectorate that could be beneficial for ensuring the enforcement of the EU social legislation and could be an experiment that could be transposed in other sector, such as seasonal work and agriculture.

**Keyword:** Road transport, Concerted Inspection, Joint cross-border inspection, European Labour Authority.

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## 1. Preliminary remarks.

The road transport sector can be considered as one of the key sectors in the European Union in terms of its contribution to GDP. As reported by Eurostat in 2021, the sector employs almost 11 million people in the EU considering road freight transports, locomotive engine, package deliverers and road passengers transports, with a corresponding ratio of 29 transport workers per 1000 people in the EU.<sup>1</sup> Looking at the road freight and passengers sub-sector, it counts more than 570,000 companies located in several Member States, mainly in the Baltic area and in Eastern Countries such as Poland, Bulgaria, Romania and Slovakia. An extremely relevant sector, even more important in our European integrated economy by the ability of operators to ensure the presence of raw materials and the conduct of logistics activities during the recent pandemic.<sup>2</sup> At the same time, these workers, who were so essential to the resilience of the European economy as defined by the European Commission in 2020,<sup>3</sup> are among those who suffer most from the effects and strains of a competitive market. It's undoubtable that transport workers are trapped into a perpetual vicious cycle that takes place from the continuous demand for cheaper goods and a corresponding pressure on transportation costs: the so-called cost pressure. This race to the bottom on transport operators results in lower wages and indecent working conditions for truck drivers, such as the reduction of breaks from driving to meet the delivery schedule or the failure to be declared as transnational posting workers that directly affect the denial of the protections provided by the relevant European legislation.

These situations are clear hypothesis of social dumping, corroborating the idea that this race to the bottom is more relevant in sectors characterized by a visible unbalance between labour and capital. The root of these problems can be traced back to an ever-present tension in the European Union, namely between the economic and social dimensions of the internal market, where the imbalance seems to favor the former over the latter. Such tension is certainly visible in this sector, especially because of its cross-border dimension where companies located in Eastern Europe can guarantee services throughout the Union at an extremely competitive cost based on lower wages compared to other Countries. An exponentially increasing trend, especially after the eastward enlargement of the Union, which has seen an increase in the number of transport companies based in Poland,<sup>4</sup> Bulgaria and Lithuania,<sup>5</sup> that it is also related to an increasing infringement of transnational posting

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<sup>1</sup> Eurostat, *Almost 29 transport workers per 1 000 people in the EU*, 23 September 2021:

[https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20210923-2#:~:text=In%202020%2C%2010.8%20million%20people,with%202019%20\(11.6%20million\).](https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20210923-2#:~:text=In%202020%2C%2010.8%20million%20people,with%202019%20(11.6%20million).)

<sup>2</sup> Rasnača, Z., *Essential but unprotected: highly mobile workers in the EU during the Covid-19 pandemic*, ETUI Policy Brief, 2020, 2.

<sup>3</sup> European Commission, *COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, 25 June 2020.

<sup>4</sup> Haidinger B., *Fraudulent contracting of work: Road haulage sector*, Eurofound, 2017, 2-7.

<sup>5</sup> Petrylaite D., Usonis J., *Implementation Issues of the Posting Directives in Lithuanian Labour Law – Transport Sector Specifics*, in Corso S. M., Greco M. G. (eds.), *Transnational posting of workers. Reflections on a new European Path*, Giappichelli, Turin, 2022, 27.

regulations, a multi-level subcontracting and the non-declaration, even partial,<sup>6</sup> of the employment relationship. In this scenario, the proliferation on non-declared operators or the systematic failure of companies to comply with sector-specific regulations are contributing to increase the proportion of undeclared work in the transport sector.

Undeclared work in road haulage is a prominent phenomenon that is directly increased by the continuous disapplication of the “complex regulation”<sup>7</sup> regarding driving and rest time or the access for the operators to the European road haulage market.<sup>8</sup> A situation that can only be faced both from a direct approach, through inspections and direct controls granted by competent authorities such as labour inspectorates to assess the infringements of the regulation or improving indirect approaches, capable of encouraging voluntary compliance by using awareness campaigns and addressing the structural conditions that cause undeclared work in the road haulage sector. From a European perspective, both approaches can be developed by the European Labour Authority (hereinafter ELA), an agency created to help Member States and the EU Commission to ensure that EU rules on labour mobility and social security coordination are enforced. A mandate to the ELA that fits almost perfectly with the problems affecting the road transport sector, that due to its transnational dimension needs to be faced through the collaboration of national labour inspectorate, a stable administrative cooperation and the supervision of such supranational agency.

The essay will briefly contextualize the relevant features of the road transport sector, looking at the complexity of the sector-specific regulation and the recent intervention of the EU Commission with the so-called Mobility Package I that revised some provisions with regards to labour inspections<sup>9</sup>. Within the legal framework of the Mobility Package I, the essay will focus on the concerted inspections already disposed by Directive no. 22/2006/EC and the role granted to the ELA, alongside with the analysis of its competencies and possible results or the development of such activity in other economic sectors affected by undeclared work.

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<sup>6</sup> Even the partial declaration of the employment contract can be qualified as undeclared work within the framework of EU Law as deeply analysed in Battista L. *Il lavoro sommerso e il ruolo dell’Autorità Europea del Lavoro*, Cacucci Editore, Bari, 2022, 48-57, available open-access at the following link:

<https://www.cacuccieditore.it/il-lavoro-sommerso-e-il-ruolo-dell'autorita-europea-del-lavoro-battista-9791259651815>. See also Ales E., *Undeclared Work: An Activity-Based Legal Typology*, in *European Labour Law Journal*,

Vol. 5, 2, 2014, 156 – 166.

<sup>7</sup> European Platform Undeclared Work, *Tackling undeclared work in the road transport industry*, 2018, 1.

<sup>8</sup> *Ibid*, 2-3.

<sup>9</sup> The Mobility Package I is composed by a set of new rules and guidance adopted by the European Union in 2020 and 2022. As reported by the European Union on the relative website, the “*Package is essential to ensure good implementation and enforcement of the road transport legislation, providing a balance between the social protection of drivers and the freedom of operators to provide cross-border transport services*”. Alongside with the normative prescription, the European Commission has prepared several sets of guidance document and Q&A. For what concerns the essay, please refer to the Directive no. 1057/2020/EU and the Regulation no. 1054/2020/EU. For information on the Mobility Package, please check the following link: [https://transport.ec.europa.eu/transport-modes/road/mobility-package-i\\_en](https://transport.ec.europa.eu/transport-modes/road/mobility-package-i_en)

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## 2. The road transport sector: a peculiar sector.

As briefly anticipated in the previous section, the road transport sector is economically relevant in the EU single market. So relevant that more than 50 per cent of the goods shipped in the EU27 is delivered through road haulage. The other half is shared among trains, planes and ships making the weight of road haulage even clearer. At the same time, however, this significance is not a clear symptom of the health of the sector. In fact, the majority of transport operators are being squeezed by an increasing cost-of-service pressure that results in fraudulent practices, both of a fiscal nature and to detriment of the working conditions of those employed in the sector.

Among the most common fraudulent practices regarding the fiscal position of the companies we can highlight the case of the letterbox companies.<sup>10</sup> Mainly directed to cut costs and being more competitive for tenders and subcontracting, these are companies or groups of companies where the general and financial management of the company's operations is located in a different jurisdiction to that of the company's legal registration. The phenomenon of letterbox companies represents the most extreme facet of company fragmentation. Moreover, it is so common in the road transport sector to be seen as the highest threat to a fairer competition. Exploiting the cross-border dimension of operations, such companies are capable of increasing the fiscal advantage derived from the registration in a particular Country and translating it into a competitive advantage in the market. This is the case of companies relocated in Bulgaria, Hungary or Poland while performing services in other EU Countries. Such practice is also known as "flagging out", seen as the unique way to survive in this sector.<sup>11</sup>

The choice to "flag out" to gain an economic advantage imposes an additional negative effect on those who are actually employed by these letterbox companies. Both wages and other working conditions are, as expected, pegged to the labour regulation of the company's Country of registration, ensuring savings in terms of labour costs and social contributions for the employer and resulting in a competitive distortion of the market.

As expected, these workers, as well as these companies, do not operate in the Country of registration but they carry out their activities in other Member States competing with domestic firms burdened by different labour costs and tax pressure. Theoretically, this would not constitute a serious problem given that the Posted workers Directive (Directive no. 71/96/EC, as amended by Directive no. 957/2018/EU) also applies to the international road transport sector. However, it is so common to observe case of non-declaration or under-declaration of posting. An action that is clearly driven to exploit the competitive working conditions provided in the *home* Country instead of those applied in the *host* Country.<sup>12</sup>

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<sup>10</sup> For an analysis of the phenomenon please see European Commission, *Letterbox companies: overview of the phenomenon and existing measures*. Executive summary, Bruxelles, 2021.

<sup>11</sup> Kummer S., Dieplinger M., Fürst, E. *Flagging out in road freight transport: a strategy to reduce corporate costs in a competitive environment. Results from a longitudinal study in Austria*, in *Journal of Transport Geography*, n. 36, 2014, 141.

<sup>12</sup> Kummer S., Dieplinger M., Fürst E., nt. (10), 141 ff.. Similarly, Haidinger B., nt. (4), 2-7.

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Alongside with the phenomenon of letterbox companies and the non-declaration of posting, there is another practice for loading and unloading goods in other EU Country that is tremendously detrimental for transport workers. A modality that in principle is totally legitimate, but widely exploited to circumvent posting regulations and gaining a corresponding economic advantage.

This practice is known as bilateral transport operation. These operations take place when a driver carries out transport operations from the Member State where his employer is established to the territory of another Member State or a third Country or back to the Member State of establishment. In such cases, “the nature of the service is closely linked with the Member State of establishment” for what concerns the application of posting rules. In fact, as provided by the tenth recital of Directive no. 1057/2020/EU, “it would be a disproportionate restriction to the freedom to provide cross-border road transport services if the posting rules, and therefore the terms and conditions of employment guaranteed in the host Member State, would apply to such bilateral operations”. In this sense, Article 1(3) of the Directive no. 1057/2020/EU therein provides a special exemption to not apply the rules on transnational posting during bilateral transport operations.

A provision further reiterated by the European Commission, through the Directorate General for Mobility and Transport, in the document 'Q&A - Questions and Answers?' attached to the Mobility Package I.<sup>13</sup>

However, such exemption could create new challenges.

It seems obvious that controlling and determining the carrier's movements between the initial path to the destination Country and the return journey is challenging, making it easy to bypass this exemption. Additionally, the scattering of carriers across Europe, combined with the insufficient staffing levels in national inspectorates, creates numerous opportunities for companies in the sector to exploit this provision.

These problems were recently highlighted by the European Labour Authority itself in a strategy paper on actions related to road transport, namely the ELA Framework for Action on Road Transport. In this programmatic document, ELA highlighted the difficulties of national inspectorate to intercept, and consequently assess, possible circumvention of the regulation mainly due to the high mobility of transport drivers.

Another practice of transport, without any derogation from the posting regulation, concerns cabotage operations: a type of road haulage for the transportation of goods for third parties, which is carried out on a temporary basis and exclusively within a State other than the one where the carrier is based.<sup>14</sup> This practice is, to date, regulated by the combined provisions of Regulations No. 1072/2009/EU (Article 8) and No. 1073/2009/EU (Articles 14-16), which indicate the limits within which a transport is to be considered cabotage.

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<sup>13</sup> The point has been explained in the second point on the scope of application of the revised regulation and the exemption provided for bilateral international transport operations. See Directorate General for Mobility and Transport, *Questions and Answers on posting of drivers under Directive (EU) 2020/1057*, 2022, 1.

<sup>14</sup> Frosecchi G., *Distacco, cabotaggio e trasporto internazionale: un puzzle ancora da comporre*, in *Rivista Giuridica del lavoro e della previdenza sociale*, 3, 2018, 43. See Allamprese A., Bonardi O., *Logistica e Lavoro*, *Rivista giuridica del lavoro e della previdenza sociale*, Quaderno, 3, 2018; Lassandari A., *La contrattazione collettiva nella logistica*, in *Rivista giuridica del lavoro e della previdenza sociale*, Quaderno, 3, 2018, 54; Gragnoli E., *I contratti di appalto e le società cooperative di produzione e lavoro nel settore della logistica*, in *Rivista giuridica del lavoro e della previdenza sociale*, Quaderno, 3, 2018, 69.

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The cabotage is admitted when a vehicle enters a member State other than that of establishment to unload an international transport, regardless of whether the vehicle is full or empty. In the first case relating to an international transport to be unloaded in a Member State, the vehicle is limited in the number of transports (loading/unloading), no more than three, that it can perform within seven days, after which it must be on its way to its Country of departure. In the second case, on the other hand, only one cabotage transport is allowed within a maximum of three days after entering the country of destination.

This practice, envisaged primarily to avoid the movement of empty carriers and to minimize the environmental impact of this highly polluting economic sector has, over the years, been a source of competitive distortion within the European Union. These loading and unloading operations take place mainly in a few EU countries, including France, Germany and Austria, reducing job opportunities for domestic carriers. In fact, according to an estimate by the European Commission, more than two-thirds of international cabotage operations are carried out in these Countries, joined by Belgium and Sweden.<sup>15</sup> For these reasons, since the adoption of Regulation No. 1072/2009/EU, these Governments have provided for stricter regulations by requiring the telematic uploading of documents from the very first transport carried out in addition to requiring proof of the posting of the vehicle driver. It should come as no surprise, then, these Countries tried to reduce as much as possible the hypothetical abuses brought by cabotage operations by increasing the administrative burden requested to international carriers in order to operate in their territory. The most evident provision was the Decree 2016-417 adopted on the 9<sup>th</sup> of April 2016 from the French Government, and known as *Loi Macron*, that extended the scope of application of the French Labour Law, specifically the provision in relation to posted workers, to international companies in the transport sector. As from July 2016, road haulers would be required to comply with French minimum wage obligations and to establish a representative in France: a provision that could be extremely costly and burdensome for EU transport companies and “could hinder their capacity to operate in France”.<sup>16</sup>

As in the case of bilateral operations, international cabotage is also characterized by increasing documentation frauds, to which is also added the circumvention of posting regulations. Several practices are increasingly being implemented to circumvent cabotage regulations by manipulating the maximum duration of such operations. This is done through weekly loading and unloading cycles of goods without any actual return to the Country where the carrier is established with a consequent manipulation of tachograph.<sup>17</sup> These practices have negative effects on the health of haulers as they bypass regulations on rest periods for drivers, and they also pose increased risks to road safety within the community. This “restart” of operations also involves the employer’s choice regarding which Country is the actual

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<sup>15</sup> Haidinger B., nt. (4), 8.

<sup>16</sup> Parliamentary question, *Question for written answer E-003794-16 to the Commission*, 4 May 2016.

<sup>17</sup> As reported by ELA, during 2022 the Agency coordinated and supported 26 cross-border joint inspections in the road transport sector in cooperation with Roadpol, identifying over 600 infringements. Among them, we can observe infringements regarding tachograph rules, driving and resting time, undeclared work and possible bogus employment. Please refer to the results of the ELA’s Framework for Action on Road Transport: <https://www.ela.europa.eu/en/news/elas-framework-action-road-transport-outcomes-and-way-forward>

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recipient of most of the operations, thus being able to choose which terms and conditions of work apply to the driver under cross-border posting regulations.

At the same time, inspections and checks on cabotage activities, as well as for other transport operations, as recalled in the preamble to Regulation No. 1072/2009/EU in Recital 17, have always been appreciated, unfortunately negatively, for their limited numerical scope and reduced effectiveness.<sup>18</sup> A consideration that also seems supportable in light of the results regarding the controls carried out after the entry into force of the 2009 regulations. The limited level of inspection is directly linked with the different workforce dedicated to such activities. As expected, the different inspectors' quota in EU27 has a clear link with the different level of checks and inspections in every Member States. For example, according to the French Inspectorate, more than 10 percent of cabotage operations have been deemed to violate the regulation or to be not compliant with the requested documentation, while according to EU data, only 0,56% of activities were illegal in the same span of time.<sup>19</sup> Moreover, inspectors should also check the working relationship between the driver and the company, mainly to assess if the worker is wrongly qualified as self-employed. A fictitious qualification that grants an economic advantage to the transport operators while circumventing the application of labour provision. Consequently, the bogus self-employment is seen as one of the challenges characterizing the transport sector, being an issue for inspectors and national inspectorate to deal with.<sup>20</sup>

The sum of these modalities of transportation and the possibility of easily circumventing the rules have obliged the European Commission to systematize and rationalize this sectorial normative. An aim that has been achieved through the adoption of a *lex specialis*, the so-called Mobility Package I, with the idea to limit any unfair competition in the market and contrasting the social dumping in this sector.

### **3. New rules for road transport operators: The Mobility package I and the concerted inspections.**

The Mobility Package I has been adopted by the European Commission in 2020, after a long consultation process among the different EU legislative actors. According to the first recital of the Directive no. 1057/2020, known as one of the main pillars in this normative package, the objective of creating a “safe, efficient and socially responsible road transport sector” cannot be granted without the respect of “adequate working conditions and social protection for drivers, on the one hand, and suitable conditions for business and for fair competition for road transport operators on the other”. Due to the high degree of mobility of the workforce in this sector, the Directive aims at introducing sector-specific rules to

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<sup>18</sup> Houwerzijl M., *The analysis of Posting Workers Directive(s) with a specific focus on EU cross-border road transport*, in Bednarowicz B., Zwaneburg A. (Eds.), *Cross-border employment and social rights in the EU road transport sector*, Eleven International publishing, Den Haag, 2019, 105.

<sup>19</sup> European Parliament, *Development and Implementation of EU Road Cabotage*, Transport and Tourism Commission, 2013, 44.

<sup>20</sup> See Battista L., nt. (6), 192-193.

ensure a balance between the freedom of operators to provide cross-border services and the application of labour law provisions to transport workers. A challenge that is not new in the European sectorial debate,<sup>21</sup> while the novelty of the Mobility Package I is to ensure “that drivers benefit from the rights to which they are entitled”<sup>22</sup> avoiding the deliberate circumvention of documents, driving and resting times or the disapplication of posting provisions. As reported by the Directive itself, there were “certain loopholes in the existing provisions and deficiencies in their enforcement” that have been identified over the years. Among the different problems reported by the Directive that have a clear impact on the legal uncertainty registered in this sector, we can observe the already mentioned phenomenon of letterbox companies or the administrative burden that created discrepancies in the application or interpretation of the existing provisions. Since the 2016, such administrative burdens were known by the European Commission, as well as the relevant percentage of frauds relating to the posting of drivers. In line of that, the recent provisions in the field of posting of workers have already been adopted with the idea of a future implementation of sector-specific provisions. In this perspective should be read the art. 1 of the Directive no. 1057/2020/EU establishing “specific rules as regards certain aspects of Directive 96/71/EC relating to the posting of drivers in the road transport sector and of Directive 2014/67/EU relating to administrative requirements and control measures for the posting of those drivers”.

Among the many amendments adopted by the Directive, it is peculiar the attention driven to checks and controls in order to assess possible violation or circumvention of both Directive no. 96/71/EC and no. 2014/67/EU. For example, art. 2 of the Directive no. 2020/1057/EU provides an amendment that is driven to oblige each Member State to “organize checks in such a way that at least 3 % of days worked by drivers of vehicles falling within the scope of Regulations (EC) No 561/2006 and (EU) No 165/2014 are checked”. Similarly, the information collected by these minimum domestic checks should be made available bilaterally under art. 22(3) of Regulation no. 561/2006/EC at least once every six months or upon reasoned request by a Member State exploiting the Internal Market Information System (IMI): a digital platform established by Regulation no. 1024/2012/EU.

Both interventions are aimed at granting the circulation of information about contraventions and irregularities sanctioned in one Member State. At the same time, the European Commission has always been aware of the differences in terms of inspections capabilities among Member States. A problem that could only be limited through the collaboration and cooperation of Member States in organizing joint inspection campaigns, where the knowledge and skills are shared among the national inspectorates.

Since 2006, within the framework of the Directive no. 22/2006/EC and as stated by art. 5, the European Commission prescribed an obligation for Member States to jointly organize at least six times per year, “concerted roadside checks on drivers and vehicles falling within the scope of Regulations (EEC) No 3820/85 and (EEC) No 3821/85”. Such checks should

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<sup>21</sup> De Smedt L., De Wispelaere F., *Road freight transport in the European Union. In search of a balance between the economic and social dimension of the internal market. A quantitative sectoral analysis*, Transfair – Executive Summary and Country Fiches, 2020, 1-9.

<sup>22</sup> Directive no. 1057/2020/EU, Recital no. 2

be devoted to the inspection of driving and rests periods and the use of the tachograph. This provision was not so effective since its introduction for several reasons.<sup>23</sup> Among them, one of the problems regarding these activities was the unsatisfying collaboration among different national inspectorates with different practices and capabilities. An issue that was causing discrepancies in the fight against abuses in cross-boarders transport operations.

The relevant novelty introduced by the Mobility Package I in this field regards the role of the European Labour Authority to grant the success of the concerted roadside checks. As stated by the 29<sup>th</sup> Recital of the Directive no. 1057/2020/EU, the ELA “whose scope of activities, as set out in Article 1(4) of Regulation (EU) 2019/1149 of the European Parliament and of the Council (14), covers Directive 2006/22/EC, could play an important role in assisting Member States carrying out concerted checks and could support education and training efforts”. In fact, the European Labour Authority is a EU Agency created in 2019 (Regulation no. 1149/2019/EU) to help Member States and the EU Commission to ensure that EU rules on labour mobility and social security coordination are enforced. A mandate that has still ongoing difficulties in being entirely accomplished - due to a relevant lack in terms of competencies<sup>24</sup> - but that can be achieved through the coordination and support of national operations.

This coordination could be achieved through the promotion and support to the concerted and joint inspections, as envisaged by Articles 8 and 9 of the Regulation no. 1149/2019/EU, and applied, in conjunction with the Mobility Package I, to the road transport sector.

Looking at these two modalities of road-side checks, we can consider them as the European Commission’s greatest gamble, since they come at the heart of national sovereignty, and they highlight the insufficient results collected by Member States in the fight against irregularities related to transnational posting and cross-border transport operations.

According to Article 8, paragraph a), of the Regulation no. 1149/2019/EU, concerted inspections are those activities “carried out simultaneously in two or more Member States concerning related cases in which each national authority operates on its own territory and, where appropriate, with the support of the Authority’s staff”. The following paragraph, letter b), introduces joint inspections: those activities that are “carried out in one Member State with the participation of the national authorities of one or more Member States, and where, appropriate, with the support of the Authority’ staff”.

The first mode allows for the full respect of the competencies of each Country, as they are responsible for conducting inspections within their own territories in cases that are interconnected. Thus, prior coordination takes place to define the scope of inspections, the companies to be monitored, the sectors involved, and the timing of activities. The goal is to ensure effective and timely control. This mode enables simultaneous oversight over a broader

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<sup>23</sup> Alongside with the different capabilities and workforce of national inspectorate, it is necessary to consider the different political imprinting given to national agencies in terms of controls, language barriers among national inspectors or the different administrative procedure applied in each Member States.

<sup>24</sup> See Battista L., nt. (6), 151-176; Allamprese A., Borelli S., Morsa M. (eds.), *L’Autorité Européenne du Travail*, Bruylant, Bruxelles, 2020, 71 ff.; Fernandes S., *What is our ambition for the European Labour Authority?*, in *Notre Europe – Jacques Delors Institute*, Policy Paper no. 219, 2018, 1-15; Battista L., Cangemi V., *European Labour Authority: Prerogatives and Limits*, in Jorens Y. (ed.), *The Lighthouse Function of Social Law*, Springer Nature, London, (forthcoming).

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territory than just the national one, without encroaching upon the competencies of different inspection entities. It has the positive effect of gathering more information on potential abusive actions and preventing irregular situations from becoming transnational.

On the other hand, the second mode builds upon the practices observed in bilateral and multilateral cooperation agreements, where inspection authorities from one Member State are invited to participate to inspections organized within the territory of another. These inspections occur through agreements between the host country and the invited Countries' inspection authorities, conducted within the host member state's territory. The European Labour Authority (ELA) provides support, if necessary.

This mode presents several challenges regarding intra-administrative collaboration, the role of foreign inspectors, and the Authority's sanctioning powers.

As stated in Article 9 regarding the terms and conditions for joint inspections, an agreement between the participating Member States must be established to manage such inspection actions. This agreement should clearly identify the hosting country and the participating countries, their powers and entitlements. The European Labour Authority (ELA) can assist in this process by providing the necessary documentation and legal support. Additionally, the agreement should define the role of the invited inspectors and specify their particular expertise. They may be designated as observers or actively involved in the inspection activities, particularly when it pertains to workers and companies from their respective Countries. This arrangement would facilitate the work of the domestic inspectorate and enhance the effectiveness of inspections and the imposition of charges, especially in cases of non-genuine posting or instances of complete or partial labour relationship irregularities.

The conjunction between the objective posed by the Directive no. 22/2006/EC, regarding a minimum of six concerted road-side checks per year, and the legal framework created to promote concerted and joint inspections could really be positive in terms of fight against labour law abuses in this economically relevant sector.

Unfortunately, the use of the conditional tense is a must here.

While the first provision is a binding one and regards the obligations of Member States in the transport sector, the one concerning the organization of concerted and joint inspections and their promotion by the European Labour Authority is, on the contrary, left to the willingness of each Member States. This is mainly due to the lack of any enforcement power for the European Labour Authority to oblige Member States to initiate or even participate to such inspective actions. A lack that is well known in the political and academic debate over the role of the European Labour Authority to promote the fight against abuses and labour law irregularities.

#### **4. The relevant challenges for the European Labour Authority in the field of concerted road-side checks.**

As briefly anticipated, the role of the European Labour Authority in the field of concerted roadside checks can be both decisive and scanty at the same time.

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Starting from the latter adjective, the lack of any enforcement and prescriptive power to the ELA could undermine its role in coordinating and supporting inspective initiatives within the EU territory. In fact, such activities or actions are only possible if there is a clear willingness from Member States to start any operation-inspection on their territories in conjunction with other national labour authorities. In a nutshell, this absence of any initiative power granted to the ELA derives from the possible threat to the national sovereignty in terms of inspections and sanctioning competencies. An issue that has been on the table since the beginning of the public debate on the creation of the ELA and that has been part of its political negotiations. In fact, during the consultation the European Commission stressed the fact that the creation of the agency “does not impose new obligations on Member states, individuals or employers, but focuses on supporting cross-border mobility and creating new opportunities”<sup>25</sup> in terms of fight against labour irregularities and administrative cooperation. A proposal that is in line with the mandate given to the ELA seen as an agency devoted to the respect of “the competences of Member States, national systems of industrial relations and existing agreements between Member States”<sup>26</sup>, following precisely the principles of proportionality and subsidiarity while reiterating, however, that only through such an initiative could the objectives envisaged by the proposal really be achieved.

According to this mandate, the Authority has more a conceptual and logistical role than a practical one in the field of inspection, since under no circumstances it can replace national authorities or undermine their competencies in this area. This role is directly linked with the lack of the already recalled enforcement power capable of obliging Countries for the participation to coordinated inspections. This is the most visible problem that could undermine the results achieved by the Agency neither be balanced by the possible infringement procedure invoked based on art. 4 TEU. A provision that could be invoked by the European Commission – not the ELA itself - and that has been far to be exercised even in the field of posting of workers or in other EU law areas where the Member State was not totally compliant with the Treaties, or the level of cooperation expected by them.

On the other side, we should not undermine the political role implicitly played by the ELA. A role that according to the recent initiatives promoted by the ELA seems to be more decisive and relevant than expected.

Following the theory of European agencification,<sup>27</sup> the EU can reach a higher result in some specific field, where the political compromise is hard to be found, through the “proliferation of small, limited jurisdictions, supposedly “technical agencies” that may appear politically harmless”.<sup>28</sup> This is the case of the European Labour Law Authority. Its mandate is clearly less ambitious than expected but, certainly, capable of advancing on politically fiddly terrains such as worker mobility and cross-border inspections. A territory that is even complicated by the different administrative practices among the Member States.

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<sup>25</sup> European Commission, Regulation of the European Parliament and the Council establishing a European Labour Authority, COM (2018), 131, final., 2018, 4-5.

<sup>26</sup> Allamprese A., Borelli S., Morsa M., Muller M., Rocca M., nt. (24), 15.

<sup>27</sup> Please refer to Battista L., nt. (6), 159; Tovo C., *Le agenzie decentrate dell'Unione europea*, Editoriale Scientifica, Naples, 2016, 26 ff.

<sup>28</sup> Shapiro M., *The institutionalization of European Administrative Space*, in Sweet S., Sandholtz W., Flingstein N. (eds.), *The Institutionalization of Europe*, Oxford University Press, Oxford, 2001, 281.

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Firstly, ELA can speed up the administrative cooperation through the promotion of the transmission of data and information, as long as communication about sanctions, among Member States. This role is easier to be achieved thanks to the support, both technical and linguistic, that ELA can offer to national inspectorates. In this way, the difference in terms of technological databases, used by Member States, could be slowly reduced with the implementation of similar informatic procedures to collect information and data on checks, sanctions and infringements. Similarly, ELA could help national authorities in overcoming any linguistic barrier that could hinder the effectiveness of the cooperation. In this term, we should highlight the trainings offered by ELA to national inspectors, the supply of already translated documents or the funds for translations.

Secondly, even if the ELA has no initiative power, it can obviously propose week of actions or campaigns directly driven to achieve some targets, in terms of checks or through the promotion of information and being capable of devoting attention to a specific relevant issue to be faced in the EU single market. For example, we should recall the campaign organized in the field of seasonal work<sup>29</sup> or the “Action week” organized in the field of road transport. These are initiatives where the participation is left to Member States, however it is quite unusual that a national authority decides to entirely skip them, so at least a single or periodical participation will be granted. In addition to that, such initiatives are totally funded by ELA which offers a logistic support and an administrative support with its staff.

For what concerns the road transport, the “Week of Actions” have been tremendously effective both on road-side check and on the possibility for the ELA to share information about the working condition and the implementation of the Mobility Package I directly to road haulers. In fact, it’s in the field of road transport that ELA is achieving the majority of its results and, probably, it is increasing its relevance as a newborn agency.

According to the data reported by the European Labour Authority, several Action weeks on road transport took place in 2022 and 2023.<sup>30</sup> During these initiatives, the ELA supported road-side inspections to tackle irregularities with the aim of improving cooperation between authorities. As reported by the ELA itself, during the last Action week of May 2023 the vehicles checked were 142 with 135 infringements detected by the 115 enforcement officers involved, including 28 observes invited from other 6 Member States.<sup>31</sup> The Action Week was organized in the territories of five Member States (Belgium, Croatia, Estonia, Italy and Lithuania). Alongside with national inspectorates, the ELA invited other two relevant players in the field of road-side check, such as ROADPOL, the European Roads Policing Network, and Euro Controle Route, a cooperation of European Road Transport Enforcement bodies from 15 European Countries. Two wide experienced entities in the field of road-side checks that could cooperate with the European Labour Authority in its mandate.

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<sup>29</sup> The campaign was name “Right for All Seasons” and was devoted to raise the awareness of seasonal workers and the employers hiring them on existing rights, obligations and counselling services. The aim of the campaign was to highlight the relevant problems regarding the undeclared work in this sector. Please visit the link for more information: <https://www.ela.europa.eu/en/campaigns/rights-for-all-seasons>

<sup>30</sup> <https://www.ela.europa.eu/en/road-transport>

<sup>31</sup> For more information please visit the following website: <https://www.ela.europa.eu/en/news/ela-successfully-supported-another-truck-and-bus-operation-may-2023>

The Action weeks are organized within the framework of Articles 8 of the Regulation no. 1149/2019/EC when the inspections are carried out simultaneously in different territories by the national authority, while on some occasions they can be organized jointly as provided by the Article 9. According to the outcomes shared by the ELA, within the “Framework for Action on Road Transport 2022”, the Agency organized 3 Action week and 26 joint and concerted cross-border inspections to support Member States with the enforcement of the rules and more than 600 infringements identified (tachograph rules, driving and resting times, irregularities in relation to posted workers, undeclared work and bogus self-employment).<sup>32</sup>

The more interesting feature of these initiatives, both the Action week and the cross-border inspections supported by ELA, is that they are totally in line with the target imposed by Article 5 of the Directive no. 22/2006/EC. In fact, the six concerted road-side checks imposed by the provision could be easily achieved within the perimeter of the Action week, so there is an implicit obligation for the Member States to actively participate to them. The minimum number of mandatory inspections, provided for in the Directive, is a *unicum* in EU law, being able to really stimulate and promote the cross-border administrative cooperation capable of unifying, in the medium and long run, the application of European labour legislation throughout the entire territory of the EU. Moreover, the binding nature of this minimum number of inspections could balance, at least in this sector, the aforementioned absence of any enforcement power by the European Labour Authority, which could, therefore, directly latch on to these activities provided for in the regulations to gain credibility and political reliability.

## 5. Final remarks.

Due to the pandemic, the European Labour Authority had a delay in its operation, creating some doubts about its role in the mosaic of actions and institutions of the European Union. As reported in this essay and supported by this delay, many commentators were not convinced about the effectiveness of the Authority due to the absence of any enforcement power or any initiative prerogative. A position that could be easily criticized if we consider the relevant actions and campaigns launched by the Authority in several fields, such as seasonal work, undeclared work and road transport.

It is precisely the road transport that seems the sector in which the ELA is building its own reliability. A sector that clearly fits in the political and operational mandate of the ELA which has the aim to ensure “that EU rules on labour mobility and social security coordination are enforced in a fair and effective way”<sup>33</sup> while making “easier for citizens and businesses to reap the benefits of the internal market”.<sup>34</sup> As seen in the previous section, the ELA is devoting attention, funds and operation in assuring the respect of EU Law in the “area of international of international transport, including road” as enshrined in the 12<sup>th</sup>

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<sup>32</sup> Please visit: <https://www.ela.europa.eu/en/news/elas-framework-action-road-transport-outcomes-and-way-forward>

<sup>33</sup> European Labour Authority’s Mission: <https://www.ela.europa.eu/en>

<sup>34</sup> *Ibid.*

Recital of the Regulation no. 1149/2019/EU. The 12<sup>th</sup> Recital reiterates that the “Authority should also deal with the cross-boarder labour mobility and social security aspects of the application of such sector-specific Union law”, confirming the specialty of the road transport and the need for an Agency capable of achieving an administrative cooperation in this field. This mandate has been invoked by ELA during the Action Week where the Agency staff was collaborating with national inspectors during concerted road checks and joint inspections. A mandate that is constantly evoked by the Mobility Package I that directly gave a role to the ELA, even if only functional and supportive, within the framework of the compulsory roadside checks.

Recalling the already mentioned theory that highlights the role of agencies in achieving more results than those expected by their harmless instruments (*supra* paragraph 4), we can observe that ELA could be a relevant player in the field of road transport. It’s involvement, even if not supported by inspective power nor sanctioning mechanisms, could pave the way for a slow but steady application of rules and provisions in this economic sector. It’s clear that Member States and national inspectorates will be more and more involved in fighting against labour irregularities and fiscal frauds, mainly to assure a fairer competitive market and to avoid the expansion of the already mentioned letterbox companies. In this scenario, the European Labour Authority could be seen as a possible facilitator to strengthen the respect of EU regulations. It’s involvement, as guidance or soft coordinator, during concerted and joint inspections could have a positive effect in the long run with a consequent impact over workers, their working conditions and transport operators and their competitiveness on a fair floor.

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