#EULabourAuthority

Examples of cases which may be referred for ELA mediation

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EUROPEAN LABOUR AUTHORITY

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1. Introduction

One of the main innovations of the ELA mediation procedure is that it covers several areas of EU labour mobility law where, to date, no formal dispute settlement mechanism exists between national authorities. This note provides **examples of potential disputes that may rise between national authorities and may be referred to ELA for mediation**. These examples are based on real SOLVIT and Your Europe Advice cases, as well as the findings of the ELA Concerted and Joint Inspections.

It is important to note from the outset that, in practice, a dispute may involve one or more different areas of EU Legislation at different stages of the mediation process. For example, a dispute initially submitted in relation to road transport workers may later reveal issues concerning posting of workers or the coordination of social security systems. For the purposes of this note, cases are presented according to legal area. However, many disputes are likely to involve cross-cutting issues spanning two or more areas, potentially including matters relating to third country nationals that fall within ELA's legal scope.

These examples are illustrative and predictive; more concrete examples will become available as the mediation procedure is used more frequently. It should also be noted that the Rules of procedure for Mediation, as well the Cooperation Agreement with the Administrative Commission, are aimed at solving potential conflicts between labour and social security matters in line with the principles set out by ELA's founding Regulation.

Furthermore, disputes admissible for mediation always concern cases between Member States. Even if a dispute arises from a complaint by a citizen or employer regarding an alleged misapplication of the EU law, it is ultimately for the Member States concerned to request, or to agree for, ELA to initiate the mediation procedure.

Finally, it is important to clarify the channels through which a mediation procedure can be triggered at ELA as well as the bodies empowered to initiate this process.

1.1 Channels for starting mediation at ELA

The mediation process may be initiated through three distinct channels.

The first channel arises when the **Member State(s)**, involved in a dispute **initiate the process**. Whitin this channel, **two different scenarios may occur:**

- Scenario 1: **only one (or some, but not all) of the Member States involved in a dispute submits a request for mediation to ELA**. In such instances, it is essential to obtain the consent of the other Member State(s) concerned before the first stage of mediation can be initiated.
- Scenario 2: **all Member States involved in the dispute agree to refer** the matter to ELA for mediation and jointly or simultaneously submit a request for mediation.

The second channel applies where **ELA itself takes the initiative** in respect of a dispute between two or more Member States that has remained unresolved despite direct contact and dialogue. In such instances, ELA will contact all Member States involved and verify whether they agree to mediate their dispute before ELA.

The third channel concerns cases handled by **SOLVIT that fall within ELA's mandate**, where the issue has **remained unresolved** due to divergent positions between national administrations.

Given these three different channels for initiating mediation at ELA, it is important to note that **depending on the initiation mechanism, the actions required from the actors involved, the applicable timeframes, and the necessary documentation may differ substantially.**

1.2 Who may submit a request on behalf Member State?

In principle, any national public institution or body competent in the fields of employment and social security in EU cross-border situations may submit a request for mediation before ELA when divergent views and/or an unresolved dispute exist with a corresponding national institution of another Member State concerning the application of the relevant EU labour and social security acquis.

Whereas it will usually be the lead ministry responsible for employment and/or social security that submits the request for mediation on behalf of the Member State concerned, it is for each Member State to determine whether its public institutions are authorized to submit such a request for mediation to ELA. Such institutions may include (1) social security institutions (2) employment services or agencies, (3) labour inspection services or (4) other public agencies.

1.3 Who may refer a closed, unresolved SOLVIT case to ELA?

In accordance with Articles 3-6 of the ELA-SOLVIT Cooperation Agreement, SOLVIT may refer cases that have been closed as unresolved in the SOLVIT database to ELA for consideration for admission to the mediation procedure. **These are cases where no solution could be found under the SOLVIT framework**.

Before referring a case to ELA, **the national SOLVIT centres concerned must mutually agree** that ELA's mediation procedure represents an appropriate next step in seeking a solution where the SOLVIT mechanisms has failed. The SOLVIT centres must ensure that the legal questions raised in the unresolved case fall within the scope of the ELA founding Regulation. Agreement on referral should be reached within fifteen working days of the case being closed as unresolved in the SOLVIT database.

Once both SOLVIT centres have agreed to refer a case to ELA, **they must inform** within 5 working days **their respective national authority and the European Commission SOLVIT team of the referral**. This obligation is limited to notification only; no prior approval from national authorities is required. The national SOLVIT centres should also agree which of them will act as the referral (the 'referring centre'). The referring centre is responsible for transmitting the case to the ELA nominated contact point.

1.4 Who may trigger an initiative by ELA?

ELA may propose the launch of a mediation procedure when it becomes aware that two or more Member States have an unresolved dispute or hold divergent opinions regarding the application of EU legislation which falls within ELA's mandate.

In such instances, the initiative is taken directly by ELA through its Mediation Secretariat.

ELA may become aware of an unresolved dispute through different channels, such as the outcomes of ELA inspections; the results of unresolved cooperation cases or information received from various stakeholders.

1.5 Involvement of Social Partners

Social Partners may play a role in mediation at ELA. They cannot, however, initiate the mediation procedure themselves.

If a dispute concerns issues related to provisions in collective agreements in Member States where the social partners are competent for their application, supervision, interpretation or enforcement, the mediator and the Chair of the Mediation Board are obliged to consult the competent social partner organisations to hear their views on the issues concerned.

In Member States where social partners do not hold such competencies, they may nonetheless participate in mediation at ELA in an advisory capacity as experts, subject to the agreement of all involved parties.

2. Legal scope

The free movement of workers is one of the four freedoms guaranteed to EU citizens by the Treaty on the Functioning of the European Union (TFEU). Article 45 TFEU, which is directly applicable in the Member States, requires them to safeguard and enforce this right by eliminating any form of barrier that could restrict EU workers from moving freely within the Union. It specifically includes the right not to be discriminated against on the basis of nationality in access to employment, remuneration and other conditions of work. Accordingly, any form of unequal treatment on the grounds of nationality in respect of such condition is prohibited.

The right of citizens to pursue economic activities in another Member State is a fundamental right enshrined in the Treaty. However, within the limits of the internal market rules, each Member State may make access to certain professions legally conditional upon possession of specific professional qualifications. This can give rise to obstacles to free movement when qualifications acquired in another Member State are not recognised[1].

In accordance with Article 13 of Regulation (EU) 2019/1149, ELA may facilitate a solution in the case of a dispute between two or more Member States concerning individual cases of application of Union law in areas covered by this Regulation, without prejudice to the powers of the Court of Justice of the European Union.

The scope of application includes the following EU legal instruments:

- Posting of Workers Directives
  - » Directive 96/71/EC as amended by directive 2018/957/EU
  - » Directive 2014/67/EU
- Social security coordination
  - » Regulation (EC) No 883/2004
  - » Regulation (EC) No 987/2009
  - » Regulation (EU) No 1231/2010
  - » Regulation (EEC) No 1408/71
  - » Regulation (EEC) No 574/71
  - » Regulation (EC) No 859/2003
- Free movement of workers
  - » Regulation (EU) No 492/2011
  - » Directive 2014/54/EU
  - » Regulation (EU) 2016/589
- Social legislation in road transport
  - » Regulation (EC) No 561/2006
  - » Directive 2006/22/EC
  - » Regulation (EC) No 1071/2009

1 YEA quarterly feedback report No 45 - Quarter 3/2023 (July-September)

3. Non-exhaustive list of examples of disputes which may be referred to ELA for mediation

3.1 Posting of workers Directives

Disputes under the Posting of Workers Directive may arise in relation to administrative formalities, the application of labour standards, or the assessment of qualifications. Examples include:

3.1.1 Administrative formalities

Administrative issues may include visa and residence requirements, identity documents, and national administrative procedures for registration.

Example 1:

A temporary work agency in Member State A proposed to post two non-EEA workers to Member State B for a limited period. Both workers held residence permits issued by Member State A. The agency applied for Van der Elst visas for the workers through the Member State B Embassy in Member State A, submitting all required documentation, including the workers' employment contracts. The Embassy refused the visas, advising that the proposed work did not satisfy the Van der Elst requirements. The applicants were not employed by the agency, instead, they were sent occasionally for short-term assignments to Member State A.

Example 2:

A company in Member State A followed the procedure to declare posted workers to the authorities of Member State B. Despite completing all required steps, the company received an automated message in the language of Member State B stating that the chosen application could not be used. When continuing to the next stages, further requirements arise, including specific identification documents. Some of these administrative requirements were objectively not feasible for the posted workers to fulfil, thus indirectly creating obstacles to posting and the free movement of workers in EU.

Example 3:

A company in Member State A encountered several difficulties when declaring its posted employees in Member State B, via a complex online form requiring multiple documents uploads. The published guidelines did not clarify procedures, particularly to find information on how to proceed if the company does not have a VAT registration in Member State B, leaving direct phone contact with the Ministry as the only option to find out such information. Further complications arose due to the requirement by the authority of Member State B of translated proof of a confirmation from the commercial or trade register, not older than 6 months, and a fee for issuing a certificate that the profession was unregulated. Such confirmation may take several days to issue and the posting notification cannot be completed without it, which delayed the posting notification. In addition, the declaration of qualifications under Directives 2005/36/EC and 2014/67/EU applies only to regulated professions in the host Member State, not to unregulated professions. Article 9 of the Posting of Workers Enforcement Directive does not specify that proof of a declaration of qualifications may be required as part of the notification process.

3.1.2 Labour contracts and employment relationships

Disputes may also relate to minimum wage and other aspects of labour contracts and employment relationships in cases of posting, including working time, annual leave, remuneration (including overtime), conditions for hiring-out of workers, conditions of accommodation provided by the employer, and allowances or reimbursement for travel, board, and lodging.

Example 4:

A temporary work agency in Member State A posted 12 workers of different nationalities to Member State B for one year. The workers resided in Member State A and had contracts with the agency. Non-EU citizens held valid residence cards issued by Member State A. During an inspection, the authorities in Member State B, including the Tax Agency, detained the workers and subsequently deported them, issuing a two-year entry ban. The authorities claimed that the workers' residence status was unclear and that the relevant paperwork was missing.

Example 5:

A national of Member State A employed by a company in Member State A was sent to work as CEO for a newly established company in Member State B. His salary was paid solely by the company in Member State A. Although he held an A1 form issued by the Social Insurance Agency of Member State A, the authorities in Member State B refused to accept it, instead requiring the company in Member State B to pay social contributions for the worker.

3.1.3 Genuine substantial activities and temporary work

Disputes may also arise over whether an undertaking genuinely performs substantial activities in the country of origin, other than purely internal management or administrative tasks. Similarly, disputes may concern the assessment of whether a posted worker temporarily carries out work in a Member State other than the one in which they normally work, following an exchange of information under Article 4 of the Posting of Workers Enforcement Directive.

3.2 Free movement of workers

Disputes may arise concerning the violation of EU citizens' free movement rights. The abuses and breaches of the relevant EU law identified by the Commission[2] include, but are not limited to, the following:

3.2.1 General obstacles to free movement

Obstacles may include delays in the registration of EU mobile workers and their family members, requirements for licences for employment, worker registration numbers or similar identifiers not being issued to foreign job seekers, and difficulties faced by third-country nationals in exercising freedom of movement.

Example 1:

An applicant, a citizen of Member State A, had previously worked in Member State B as a security guard and already held a professional card based on prior work experience. As the card was nearing expiry, he requested its renewal in Member State B but was refused unless he could prove proficiency in the language of Member State B. The applicant's mother tongue is that of Member State B, his degrees were completed in this language, and he had held several previous jobs in Member State B. Despite completing all required registration steps, none of the measures offered a timely solution, as they would only take effect after the deadline had passed, effectively preventing him from working in Member State B.

3.2.2 Obstacles in access to employment

Obstacles may include excessive restrictions to posts in the public sector, or the denial of EU mobile workers' participation in training programmes offered exclusively to nationals of the host Member State.

Additional examples may include disputes related to the application of discriminatory practices by one Member State, such as limiting job offers to nationals or requiring language skills which go beyond what is reasonable and necessary for certain jobs.

Disputes may also arise concerning working and employment conditions in the territory of the host Member State, such as situations where nationals of one Member State working in another do not receive the same social and tax advantages, or have restricted access to housing. This may occur, for example, where the workers in question are frontier or cross-border workers and do not reside in the Member State of employment.

3.2.3 Recognition of professional qualifications

Disputes may concern the recognition of professional qualifications obtained in another Member State.

Example 2:

A national of Member State A requested that the local authorities recognise his professional qualification as a secondary school teacher completed in Member State B. He sought recognition of professional experience gained in another public administration as merits for recruitment, as well as recognition of seniority in the public employment sector. Both requests

2 VC/2011/0476, Study to Analyse and Assess the Socio-Economic and Environmental Impact of Possible EU Initiatives in the Area of Freedom of Movement for Workers, in Particular with Regard to the Enforcement of Current EU Provisions, Revised Draft Final Report, April 2012.

were refused on the grounds that the experience had not been acquired in Member State A. This refusal caused significant difficulties, as the experience was essential for accessing better opportunities, higher pay, and improved working conditions. Under EU law on free movement of workers, this case involves the recognition of professional experience for career advancement, protected under Article 7(2) of Regulation (EU) No 492/2011 on equal treatment and access to social advantages.

3.2.4 Recognition of length of service

Disputes may also concern the recognition of length of service acquired in another Member State.

Example 3:

A national of Member State A, a vascular surgeon, completed medical training in Member State B and is registered in both countries. Having worked as a senior doctor in Member State A for 15 months, he submitted proof to the Chamber of Physicians in Member State B. The Chamber refused to recognise his senior-level experience, accepting only general medical practice. The applicant sought recognition of his senior experience in Member State A as equivalent to that in Member State B.

3.3 Social Security coordination

Disputes under social security coordination may arise in a range of areas, without prejudice to the competence of the Administrative Commission[3], including the determination of applicable legislation, entitlement to benefits, and the issuance of relevant documents. Examples include:

3.3.1 Determination of applicable legislation

Disputes may occur between two or more Member States on the determination of the applicable legislation. Issue can include whether the employer satisfies the posting conditions in the sending Member State (substantial activity, direct link), whether the employer qualifies as the 'real employer', whether posted workers are placed by other posted workers (chain posting), and the assessment of substantial activity or direct links, based on evidence and facts exchanged between the Member States.

Example 1 – Teleworking:

A citizen of Member State A intended to move to Member State B while retaining employment with her employer in Member State A. She sought advice from the health insurance authority and a lawyer in Member State A regarding which rules would apply but received incorrect information.

3.3.2 Competence for provision of benefits

Disputes may arise concerning which Member State is competent to provide benefits in cash or in kind, such as unemployment benefits for frontier or cross-border workers.

Example 2:

A citizen residing in Member State A teleworked for a company in Member State B. She queried her entitlement to unemployment benefit, as she was insured in Member State B and claimed that MS B should be competent for payment.

Example 3:

Article 17 of Regulation (EC) No 883/2004 provides that a person insured in one Member State but living in another is entitled to healthcare in their State of residence, paid by the State of insurance. However, Member State A did not cover children under family insurance when one parent was a cross-border worker and the other worked in the country of residence.

Example 4:

A citizen of Member State A residing in Member State A who had previously worked in Member State B gave birth one year ago and applied immediately for family benefits. The authorities in Member States A and B were unable to agree on which body was competent, leaving the citizen without access to any benefit.

3 Disputes dealing with coordination of social security will be dealt with in line with the principles established in the cooperation agreement between ELA and the Administrative Commission.

3.3.3 Issuance and withdrawal of documents

Disputes may arise when requests to withdraw documents issued by one Member State, based on information provided by another Member State, are not actioned by the issuing Member State. Long delays in issuing documents may also affect entitlement to benefits.

Example 5:

A citizen from Member State A moved to Member State B and attempted to register with social security there. Member State A was supposed to send the relevant form to Member State B. While MS A claimed the form had been sent, MS B stated it had never received it. This issue persisted for two years, during which time the citizen became pregnant and had to cover high medical costs without social security coverage.

3.3.4 Reimbursement between Member States

Disputes may also arise concerning delays in reimbursements between Member States, which can affect the timely payment of benefits to individuals.

3.4 Social legislation in road transport

Disputes under road transport social legislation may arise concerning the application of rules on driving times, breaks, rest periods employment conditions, and the minimum requirements for road transport operators. Examples include:

3.4.1 Misapplication of rules on driving times, breaks and rest periods

Disputes may concern the misapplication of rules on driving times, breaks, and rest periods by one Member States, based on inspections and evidence obtained in another. For instance, increasing the driving and working times, reducing rest times, or avoiding required breaks may contribute to enhance driver productivity and vehicle utilisation while lowering operational costs. The risk of detection and high penalties does not necessarily prevent all operators from circumventing the rules, placing compliant operators at a disadvantage.

3.4.2 Abuses of the Posting of Workers Directive

Disputes may also arise concerning certain business practices which may constitute abuses of the provisions of Posting of Workers Directive. This is the case of operators legally established in one Member State providing transport services regularly or for long periods in other Member States without applying the core terms and conditions of employment, including pay, applicable in the host State.

3.4.3 Letterbox companies and illegal cabotage

Disputes may concern the operation of letterbox companies or cases of illegal cabotage, where transport companies are registered in one Member State but operate primarily in another without complying with local employment and social legislation.

3.4.4 Misuse of social legislation for enforcement purposes

Disputes may arise when road transport social legislation, such as tachograph rules, is misapplied to impose fines unrelated to safety, for example, issuing speeding fines inappropriately.

3.4.5 Minimum conditions for road transport operators

Dispute may concern whether a transport company satisfies the minimum conditions to be granted a permit as a road transport operator in one Member State, on the basis of inspections and evidence obtained in another Member State.

Example 1:

A third-country national driver employed by a company in Member State A was fined in Member State B because the driver attestation issued by the Association of International Road Carriers in Member State A was presented as a copy. The driver had the original attestation but was unable to produce it during the police check and showed a photo instead. The company confirmed that the driver carried the original attestation and all other required documents in the truck. The company disputed the fine, arguing that it was excessive and that Article 16 of Regulation (EC) No 1071/2009 had been misapplied. Member State A supported the view that the regulation had been incorrectly applied.

Example 2:

Police in Member State A stopped a vehicle belonging to a road transport company in Member State B and fined the driver for not returning to the country of residence of his employer or his personal residence after four weeks. The driver presented a letter confirming that he had spent the rest period in Member State C, which the employer had verified. The police refused to accept the letter and issued a fine. Under Article 8(a) of Regulation (EC) No 561/2006, as amended by Regulation 2020/1054, returning home is not an obligation of the employee; the employer must offer the opportunity, which the employee may accept or refuse. In this case, the employer had offered such an opportunity, and the driver had evidence to demonstrate it. The authorities in Member State B considered that Member State A had unlawfully applied EU legislation, violating the employee's rights. The European Commission's guidance for EU surveillance authorities, published online, had not been followed in this case.

Example 3:

Police in Member State A stopped a truck from Member State B and alleged that the driver had violated weekly rest periods under Article 8(6) of Regulation (EC) No 561/2006. The company disputed the accusation, arguing that all rest periods had not been considered, and that if they had, no violation would have been detected in accordance with Article 9(1) of the Regulation. Member State B requested that Member State A investigate the matter and assist in annulling the fine.

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