

PROJECT CIBELES, AN OVERVIEW

MAIN FINDINGS, CONCLUSIONS AND PROPOSALS

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This document summarizes the research carried out by Project CIBELLES.
The complete final documents of the Project are available in:

<http://www.mtin.es/itss/web/index.html>

This publication is commissioned under the European Union Programme for Employment and Social Solidarity (2007-2013). This programme is managed by the Directorate-General for Employment, social affairs and equal opportunities of the European Commission. It was established to financially support the implementation of the objectives of the European Union in the employment and social affairs area, as set out in the Social Agenda, and thereby contribute to the achievement of the Europe 2020 goals in these fields.

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1 Foreword

National Labour Inspectorates are entrusted with guaranteeing comparable levels of protection in all the Member States, in the framework of a common legislation on Occupational Safety and Health (OSH). This guarantee becomes especially relevant in the context of a transnational provision of services, where posted workers are entitled to enjoy the same terms and conditions on OSH than national workers, pursuant to the Posting Workers Directive 96/71/EC.

The transmission and exchange of information among Labour Inspectors, their mutual and active cooperation in enforcement procedures to investigate breaches and facilitating the cross-border execution of fines are indispensable tools to ensure these aims. Therefore, cooperation in cross-border enforcement and a good functioning of mutual assistance mechanisms are key needs for all the European Labour Inspectors in their usual supervision duties.

In April 2010, Project CIBELES, approved by the Senior Labour Inspectors Committee (SLIC) and supported by the European Commission's PROGRESS Programme, began to explore the problems and boundaries of these matters, involving to this purpose nine National Labour Inspectorates in the research. After a year and a half of work, CIBELES has delivered conclusions and proposals focused on enhancing cooperation among Labour Inspectorates and putting the Inspectorates at the same level as other similar institutions which carry out cross-border enforcement activities at European level, as e.g. taxes or customs.

We would like to thank the European Commission and the SLIC that entrusted us with developing the set goals and provided funding.

We would like to address special thanks to the different experts who assisted us during the project in the Conference of Mallorca and the in technical visits to the CIBELES' countries.

Last but not least, CIBELES would have not been possible without the time, dedication and effort of the colleagues who have acted as national experts for their respective authorities, and have delivered the input from the work floor from Belgium, Malta, Hungary, France, Austria, Germany, Italy, Portugal and Spain.

We do hope that the “conclusions and proposals of the Project CIBELES” will contribute to boost a closer cooperation between the European National Labour Inspectorates and will also be considered by all the European stakeholders involved in OSH and posting of workers.

Manuel Velázquez Fernández
Labour and Social Security Inspector
Project CIBELES’ Director

2 Executive Summary

2.1 PROJECT CIBELES

Project CIBELES was approved by the Senior Labour Inspectors Committee (SLIC) in 2009 and financed by the European Commission. Nine SLIC members from the Labour Inspectorates of Belgium, Malta, Hungary, France, Austria, Germany, Italy, Portugal and Spain took part in the project.

The kick-off meeting was held in April 2010 and the Final Conference shall take place on 10th and 11th November 2011 in Madrid. The activities undertaken are documented in Chapter 2. These include a conference of experts in Mallorca (October 2010). Chapter 3 is a compilation of the papers presented at that meeting. Chapter 4 is a compilation of the reports on the technical visits to each partner Member States. The CIBELES team of experts met in Mallorca (June 2011) to define proposals and draft the project conclusions. In September 2011 a meeting was held with experts from the European Commission in Brussels. General Report (Chapter 5) and the Conclusions and Proposals (Chapter 6) describe the final outcomes of the project. The Annex contains a statistical study on posting in Spain.

2.2 THE AIMS OF THE PROJECT

The purpose of the Project is to improve the manner in which information is exchanged between European Labour Inspectorates to ensure enhanced cross border enforcement and mutual assistance in inspection and sanctioning proceedings, and make proposals to the SLIC and the Commission with a view to further initiatives, programmes and regulations on these issues.

The core elements of the project are transmission and exchange of information among Labour Inspectors, their mutual cooperation in enforcement procedures to investigate breaches and the cross-border execution of fines. These matters are already regulated at European level in other sectors such as taxes or customs. The aim of the CIBELES proposals would be to ensure the same level of mutual assistance between labour inspectorates as other similar institutions engaged in cross-border enforcement activities.

2.3 THE RELEVANCE OF OCCUPATIONAL HEALTH AND SAFETY (OSH)

The organisation and competences of the European Labour Inspectorates can vary from one country to another. The only common competence is Occupational Safety and Health (OSH) and for that reason **all our conclusions and proposals are OSH-oriented** without detriment to their general scope and the logical links of OSH with other matters.

All European MS share a **common legislation on OSH** derived from the current Article 153 TFEU and Directives. Consequently, all European Labour Inspectors are bound to ensure these are fulfilled and enforced (Article 4.3 TEU and Article 4.2 of the Framework Directive 89/391/EEC) in an effective and uniform manner in order **to guarantee comparable levels of protection in all the Member States** (Community strategy 2007-2012 on health and safety at work).

On the other hand, enforcement of **OSH rules also pertains to the functioning of the Internal Market** with regard to the free movement of goods (Art. 28 TFEU) which may affect OSH such as machinery or dangerous agents, the free provision of services and particularly the posting of companies and workers (Art.56 TFEU). All Member States, and their national rules, are bound to the basic principle that companies should guarantee workers posted to another Member State (Article 3 Directive 96/71/EC –PWD-) the same terms and conditions of employment as regards OSH.

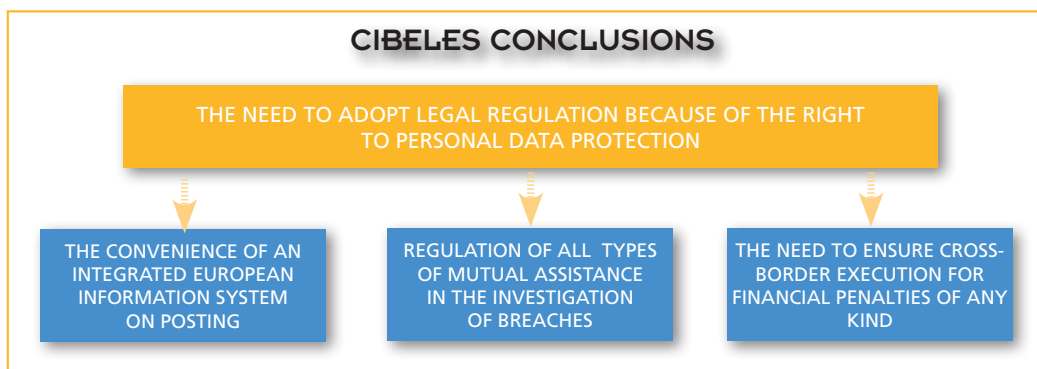
Posting can involve a certain deterioration of working conditions where it combines with fewer resources available for workers, greater risk of fatigue due to frequent travel, lack of training provided in the host country, absence of mandatory protective equipment, sub-standard housing and dangerous transport.

Enforcement of national legal rules on OSH requires **cooperation and mutual assistance among Labour Inspectors** from different Member States pursuant to article 4 of PWD. Otherwise, infringements of posted companies cannot be fully investigated, hindering cross-border execution of fines and therefore resulting in impunity. Consequently, the treatment provided to companies by Labour Inspectors would not be equal.

2.4 PROJECT CIBELES CONCLUSIONS

Project CIBELES conclusions are structured as follows: a first and general conclusion on **the relevance of personal data protection** aimed at legally ensuring the transmission of information and mutual assistance in enforcement procedures, and three conclusions regarding the three steps of the enforcement process:

- 1) The need for **an integrated information system on posting** to prepare and design inspection activity (prior to inspection)
- 2) The **regulation of all types of mutual assistance** in the investigation of breaches (during the inspection)
- 3) The need to **ensure cross-border execution of all manner of financial penalties** (after the inspection)



2.5 THE PERSONAL DATA PROTECTION

According to the advice of the European Protection Data Supervisor (EDPS) **protection of personal data is a fundamental right** (Article 8 of the Charter of Fundamental Rights of the Union and Article 8 of the European Convention on Human Rights ('ECHR')). Thus there should be no doubt as to the legal status of provisions restricting fundamental

rights and, **those provisions must be laid down in a legal instrument, on the basis of the EC Treaty, which can be invoked before a judge. Otherwise, the result would be a legal uncertainty** for the data subject since he cannot rely on the fact that he can invoke the rules before a Court.

Therefore the first assumption in the transmission of information and mutual assistance among Labour Inspectors is that **these matters should be previously regulated by legal instruments at European and National level. This is to avoid uncertainty for the regulatory authorities when they use mutual assistance mechanisms for reasons of personal data protection.**

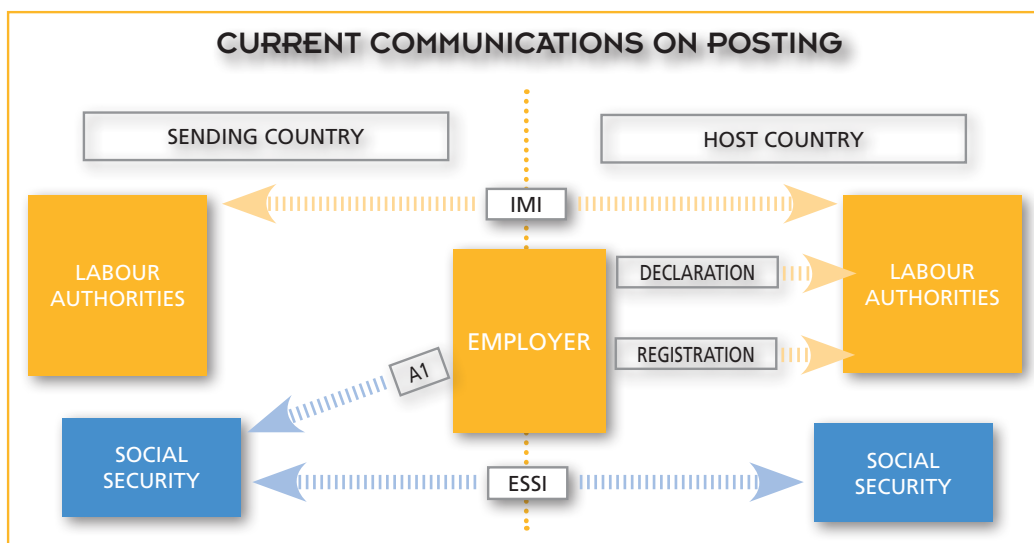
2.6 AN INTEGRATED INFORMATION SYSTEM ON POSTING TO FACILITATE THE DESIGN OF INSPECTION ACTIONS

For labour inspections to be conducted information on companies, workers and workplaces are essential. Labour Inspectors usually need to know the companies and workers operating in their territory. They need to be availed of instruments to verify the companies' identity, location of the workplaces and the nature of their activities. In addition to this, inspectors need information on the most significant OHS-related incidences, in particular work-related accidents and occupational diseases when these occur in order to monitor them.

2.6.1 Communications and information on posting

The current legal requirements on posting communications and European information systems on posting present **significant deficiencies for both employers and public bodies**. Employers face a daunting task in seeking information since the legal requirements are different in each Member State.

This often necessitates at least two or more different procedures for posting in different languages, one in the country of origin for Social Security issues (A1 form), one in the host country to declare posting (for almost half of the MS) and often another to register their companies. Not to mention notifications required in case of work-related accidents. Public bodies of both countries are related by two different networks (IMI and ESSI) which are not interconnected.



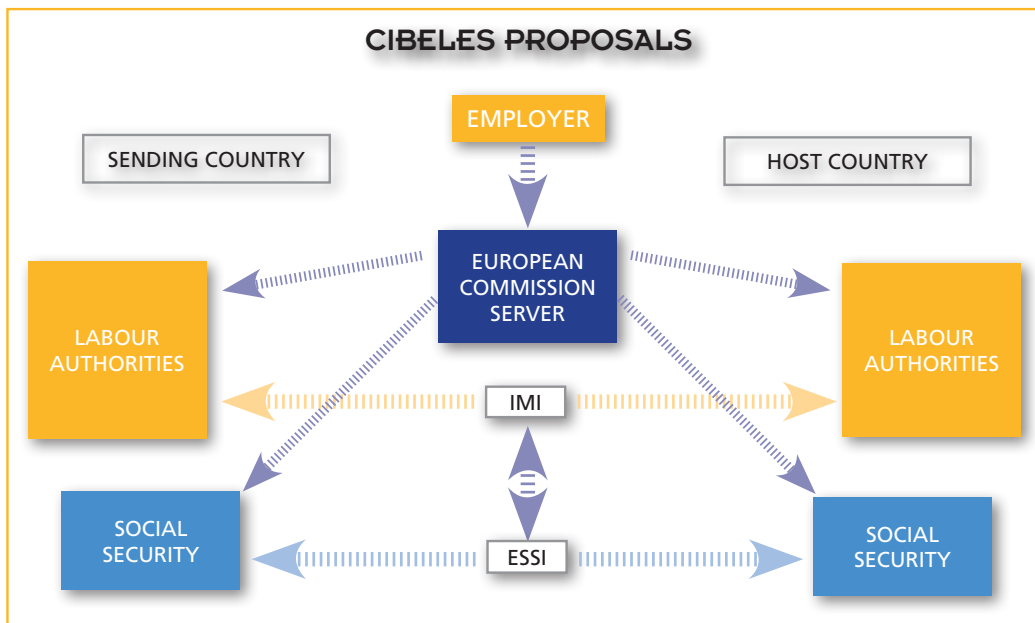
On the other hand, new legal provisions of the Member States, by virtue of which the inspectors are authorised to request companies supply additional information about posting, produce documents and so on, may clash with the basic right of free movement of service providers as the ECJ has already ruled.

To remedy this situation Project CIBELES seeks to propose a **win-win strategy** to simplify and unify obligations for employers and improve communications between administrative bodies easing bureaucratic burdens for both.

Our **first proposal is a measure to coordinate all communications on posting in an integrated procedure at European level and interconnect the current information networks** (Article 114 or 197 TFUE). Employers would have the facility to electronically submit all the communications required by the legislations of the sending country and host country in a unified procedure to a EU server that would then distribute the information to all the public bodies concerned.

Such a system would also give employers permanent access to their own files.

This measure could be applied to all posting procedures or only to specific (highest risk) sectors.



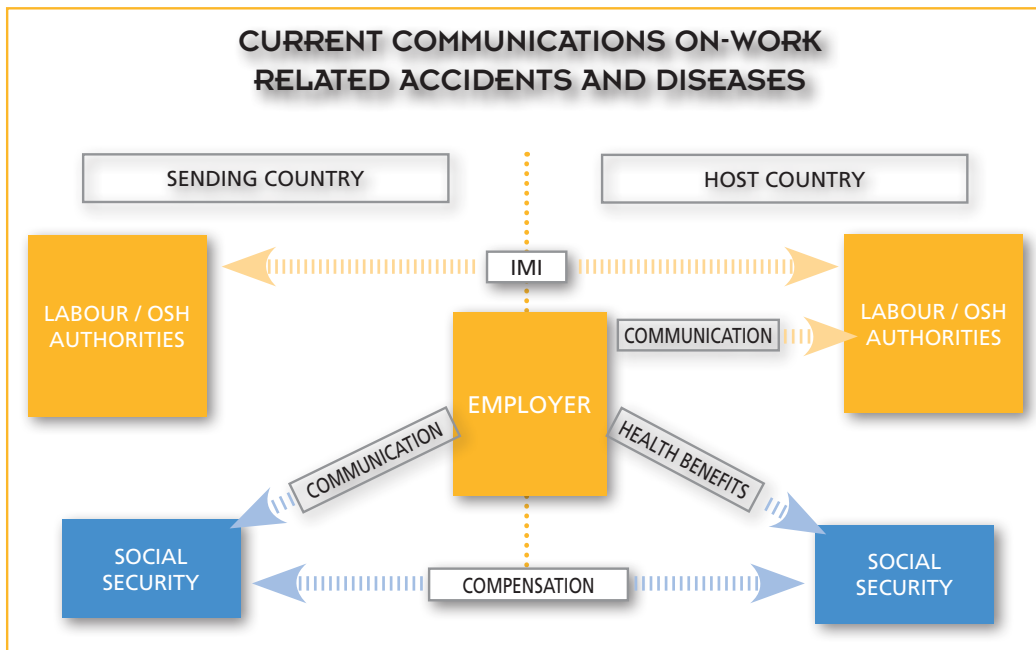
The second proposal takes this further and would entail introducing a **measure to harmonize legislation on communication of posting Europe-wide** (Article 114 or 197 TFUE) and unify the obligations to be fulfilled by posted companies as well as ensuring the supervision tasks of Labour Inspectors. The CIBELES team experts propose to establish a uniform European mandatory declaration on posting to the regulatory authorities of the host countries.

The **third proposal** is also related to the previous two. It is **to ensure the effectiveness of the legal duties on communications providing sanctions to deter breaches in case of non-compliance with the posting declaration.**

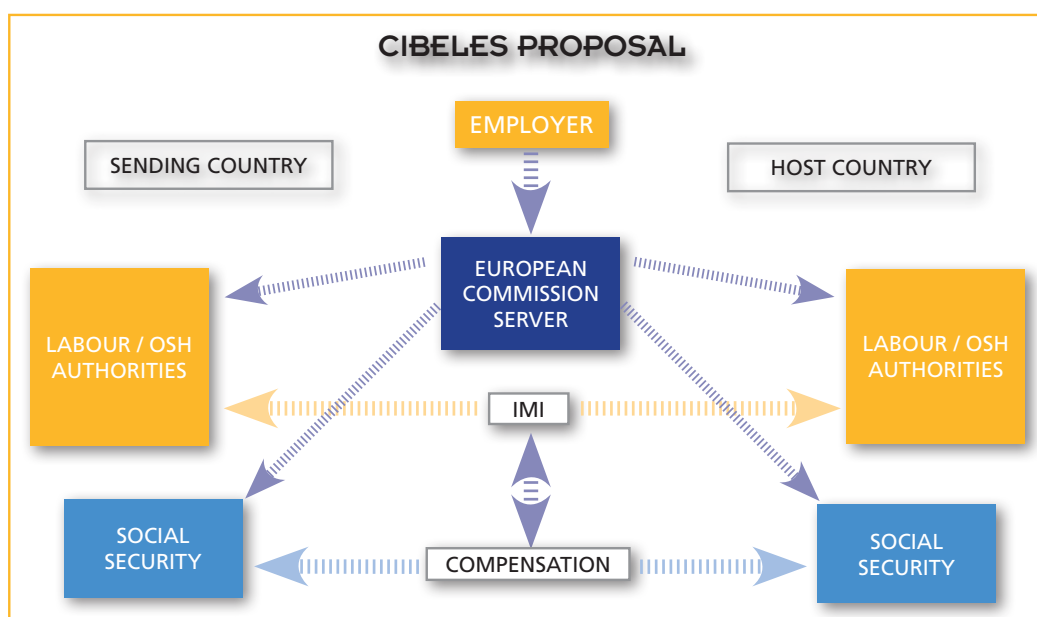
2.6.2 The communications on work related accidents and professional diseases of posted workers

When work-related accidents and diseases occur, employers are obligated to file a double notification to the competent Social Security institution of the country of origin and also in most cases, to the regulatory authorities of the host country.

The first notification is necessary to determine social benefits entitlements and the second has been established to facilitate the investigation of OSH and other working conditions by Labour Inspectors.



In order to avoid fraud, double bureaucracy and underreporting the fourth CIBELES *proposal is that communications on work-related accidents and diseases of posted workers should follow a coordinated, European level procedure* (Article 114 or 197 TFUE).



2.6.3 A common instrument to identify posted workers

Another need for Labour Inspectors is to be able to identify posted workers in the workplace. The most common instruments are national identity cards, passports (if there are any at all) and A1 forms which authenticity the Inspectors cannot verify. Moreover, A1 forms are often missing at the workplace or can be delivered by the sending country with retroactive effect.

For that reason, **the fifth CIBELES proposal is to provide posted workers with a European identification card which they can show to Labour Inspectors** (Article 114 or 197 TFUE).

The first option would be to embed this facility in the European Health Insurance Card (EHIC). Posted workers are often provided an EHIC and therefore this does not entail an additional administrative burden.

A second option would be to follow up the STORK project to establish a European eID Interoperability Platform thus enabling citizens to establish new e-relations across borders, just by presenting their national eID.

A third option would be a “photographic posting identification card”, provided by the same authority issuing the A1 form.

Lastly, a fourth option would not be an identification document per se, rather a list of employees’ names and Social Security numbers. This document should be kept at the workplace by the employer at all time during the period of posting and presented to Inspectors upon request.

2.7 REGULATION OF ALL TYPES OF MUTUAL ASSISTANCE IN MATTERS RELATED TO THE INVESTIGATION OF BREACHES

Pursuant to ILO Convention No 81, ratified by all European MS, the proceedings for investigation of breaches by Labour Inspectors is in most cases **an administrative procedure**. It shall be left to the discretion of Labour Inspectors to give warning and advice instead of instituting or recommending proceedings (Article 17.2 ILO Convention). The only exception would be, in some MS, investigations conducted by the judicial authorities.

Mutual assistance in the investigation of breaches by European Labour Inspectors is currently regulated by Article 4 PWD but only with regard to information supplied upon request. Other current modalities of mutual assistance are those related to technical cooperation that does not involve personal data (KSS) or those arranged by bilateral agreements whose scope, content and effectiveness can vary considerably.

There are other legal instruments on mutual assistance which are not always applicable to all MS. The first is the Convention for Mutual Assistance on Criminal Matters (2000), which cannot be used by MS whose penalties are administrative and cannot be appealed against in criminal courts. The second is the European Convention on the Service Abroad of Documents relating to Administrative Matters (1977), which has been ratified only by a few MS. Lastly, the third, is the **national legislation of some MS** (Belgium, Spain, France and Hungary) regulating mutual assistance between Inspectorates but it is only applicable in their jurisdiction.

The conclusion reached is that there is still need for a regulation on Mutual Assistance in matters related to the investigation of breaches, conducted by Labour Inspectors, and that this should be legally binding for all MS.

Exchange of Information

The sixth CIBELES proposal is that a measure should be instated to regulate all forms of exchange of information among Labour Inspectors (Art. 114 or 197 TFUE).

These forms of exchange should include **requests for information** (already provided for in Article 4 PWD) that should furnish not only the information already available to the recipient but also any investigation required to procure such information and its subsequent transmission to the applicant.

Spontaneous information related to offences and infringements of rules of law the punishment or handling of which falls within the competence of the authority of another Member State at the time the information is provided, as well as alerts on possible infringements especially important on OSH matters.

Lastly, it also involves the **technical cooperation** between Labour Inspectors to exchange information on National legislation, on products such as machinery, dangerous agents, best practices, products, safety topics, scientific knowledge sharing, etc., or inspection procedures on OSH-related matters.

This information may include personal data given that in many MS legal protection also encompasses legal persons and thus it is advisable to avoid legal uncertainty and to include this form of mutual assistance in a legal regulation.

2.7.1 Cooperation

The seventh CIBELES proposal is to regulate at European level all forms of physical or active cooperation among Labour Inspectors.

Cooperation entails joint actions to perform out enforcement procedures. The typical forms are the **hearing of witnesses**, necessary to reconstruct the facts occurred on the occasion of a work-related accident. **Joint teams of Inspectors** participate in simultaneous cross-border actions either on a mutual basis or as part of SLIC European campaigns as well as lending other forms of **support in procedures** with regard to the notification of administrative acts and judicial procedures.

2.7.2 A European network of experts on OSH (EUROSH)

The eighth CIBELES proposal is to constitute a European network of experts on OSH possibly to be called EUROSH.

Unlike others, this network would not act upon request as IMI but would be proactive, facilitating technical assistance to Labour Inspectors on OSH-related matters and organising European level training and information actions.

The legal value of evidence collected through mutual assistance

The ninth CIBELES proposal to regulate the legal value of information exchanged to be used as evidence by inspectors in their enquiries, so as to ensure that this information has the same value as their own “de visu” findings. This should also apply to findings resulting from joint actions or active assistance in enquiries.

2.7.3 Regulating national scope of OSH legislations

The tenth CIBELES proposal is to clarify the scope of national legislations on OSH for posted workers, especially in aspects relating to medical surveillance, occupational health and safety services and training. It would be desirable to avoid double regulations or loopholes.

2.7.4 Bilateral agreements

The eleventh CIBELES proposal is to provide a legal basis for bilateral agreements derived from a European legal instrument.

Labour Inspectorates have essentially the same powers but not the same competences. A future European legal framework should be flexible and include provisions for all of the above. Mutual Assistance must be adapted to different situations making such assistance possible whenever feasible, and further reciprocal engagements through multilateral or bilateral agreements under European legislation. This legal basis should also cover the use of personal data, privacy and the legal evidence issues.

2.8 THE NEED TO ENSURE CROSS-BORDER EXECUTION FOR ALL TYPES OF FINANCIAL PENALTIES

Unlike the procedures in investigation of breaches, the nature of punishment procedures on OSH-related matters are different in each country. All CIBELES countries have administrative fines procedures but in addition there are four MS (BE, MT, FR, IT) whose system relies predominantly on criminal procedures. On the other hand, administrative fines procedures may vary in nature, sometimes fines can be appealed in a criminal court (DE), in others this appeal goes to the labour courts (BE, HU, PT) and in others to courts that deal with complaints relating to the Administrative Court (AT, ES, IT).

Labour Inspectors do not have the same legal status in all MS. They prosecute criminal offences only in four CIBELES countries and they exclusively prosecute administrative offences in five CIBELES countries.

The current instruments which regulate cross-border execution of financial fines are not always applicable to all MS.

- Execution of fines can be carried out under **Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties** when the fines are imposed by judicial authorities and when they are imposed by administrative authorities and can be appealed before the criminal courts as in France, Malta and Germany (Belgium and Italy have not implemented this legal instrument).

It is more dubious, and this could depend on the nature of the national legislation, when the fines are imposed by administrative authorities and they can be appealed before other courts than penal courts. This aspect concerns not only the countries which deliver administrative fines but also the countries which should execute them. This is to say that all countries are eventually concerned. At least four CIBELES MS (BE, HU, ES, FR) consider that this FWD is not applicable to this type of financial fines.

- Regards the execution of fines a further option is **Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures**. This Directive (Article 2.2.) enables the competent authorities to levy the taxes or duties concerned, to execute fines or conduct the necessary administrative enquiries at the request of administrative or judicial bodies.

However, some CIBELES countries have expressed doubts regarding the applicability of this Directive to penalties from administrative bodies other than tax administrations or other legal duties not relating to public incomes such as OSH-related matters.

2.9 A GLOBAL REGULATION ON CROSS-BORDER EXECUTION OF FINES

The elemental solution for this problem would be *a legal instrument regulating the mutual recognition and execution of all manner of financial fines*, in particular those imposed for breaches of national provisions transposing article 3 of the PWD (*twelfth CIBELES proposal*), be they of criminal or administrative nature, regardless of what tribunals or courts are competent to hear appeals against administrative fines.

However, given the difficulty in establishing such a global regulation for all the possible administrative and criminal financial fines at European level, *the thirteenth CIBELES proposal is to set up a European regulation to execute administrative fines on OSH or posting matters which can be appealed to courts other than the criminal courts* and therefore excluded from scope of the FWD 2005/214/JHA.

This enforcement instrument could be adopted in the domain of posting (under the scope of Article 3 of the Directive 96/71/EU which includes OSH-related matters) pursuant to Article 114 TFEU or specifically on occupational safety and health pursuant to Article 153 TFEU.

Harmonization of infringements on OSH regulations

Lastly, *fourteenth CIBELES proposal is the harmonization of infringements of OSH regulations* since double criminality is a common precondition for mutual assistance and mutual recognition in the execution of financial fines and therefore this principle could jeopardize the implementation of the previous proposal.

Before such a measure can be put into place, a comparative analysis is required of infringements in Member States (Article 156 TFEU).

3 Project CIBELES conclusions and proposals

3.1 CONCLUSIONS AND PROPOSALS

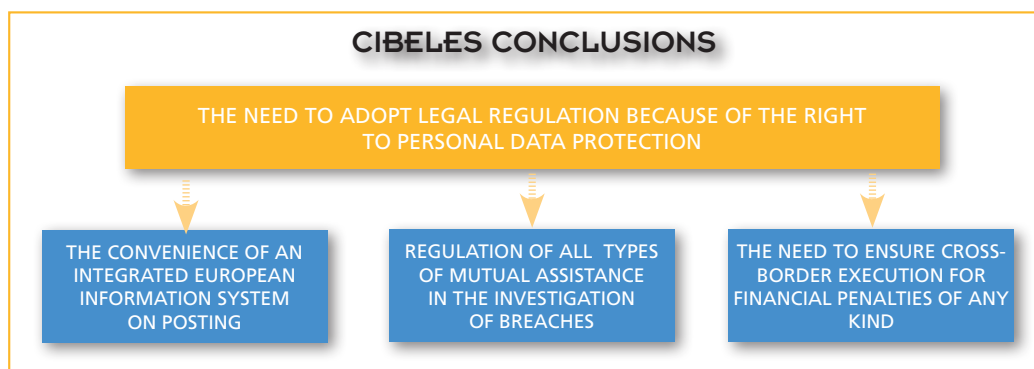
The purpose of the Project is to improve the way in which information is exchanged between European Labour Inspectorates to ensure enhanced cross border enforcement and mutual assistance in inspection and sanctioning proceedings and making proposals to the SLIC and the Commission with a view to further initiatives, programmes and regulations about these issues.

The core elements of the project are transmission and exchange of information among Labour Inspectors, their mutual cooperation in enforcement procedures to investigate breaches and the cross-border execution of fines. These matters are already regulated at European level in other sectors as e.g. taxes or customs. The aim of the CIBELES proposals would be to ensure the same level of mutual assistance between labour inspectorates as in other similar institutions engaged in cross-border enforcement activities.

The organisation and competences of the European Labour Inspectorates can vary from one country to another. The only common competence is Occupational Safety and Health (OSH) and for that reason all our conclusions and proposals are OSH-oriented without detriment to the general scope of some of them and the logical links of OSH with other matters.

Project CIBELES conclusions are structured as follows: a first and general conclusion on the relevance of personal data protection aimed at legally ensuring the transmission of information and mutual assistance in enforcement procedures, and three conclusions regarding the three steps of the enforcement process:

- 1) The need for an integrated information system on posting to prepare and design inspection activity (prior to inspection)
- 2) The regulation of all types of mutual assistance in the investigation of breaches (during the inspection)
- 3) The need to ensure cross-border execution of all manner of financial penalties (after the inspection)



3.1.1 The significance of personal data protection in mutual assistance between labour inspectorates

////// FIRST CONCLUSION: THE NEED FOR A LEGAL REGULATION ON INFORMATION SOURCES AND MUTUAL ASSISTANCE FOR LABOUR INSPECTORS IN ENFORCEMENT PROCEDURES DUE TO THE RIGHT TO PERSONAL DATA PROTECTION

Personal data is “any information relating to an identified or identifiable natural person” (Directive 95/46/EC) and **personal data protection** is a fundamental right pursuant to Article 16 TFEU and Article 8 Charter of Fundamental Rights of the EU.

The data collected and stored by Labour Inspectorates in legal enforcement procedures always includes data on “identifiable natural persons” and this is considered “processing of personal data”.

It is customary for Labour Inspectors to use personal data in legal enforcement procedures. They do not use them in technical cooperation matters but even in this case they are susceptible to mention.

The European Protection Data Supervisor (EDPS) points out that “the protection of personal data is recognised as a fundamental right in Article 8 of the Charter of Fundamental Rights of the Union and in the case law on the basis of Article 8 of the European Convention on Human Rights (‘ECHR’)” and “based on the case-law under the ECHR, **there should be no doubt about the legal status of provisions restricting fundamental rights.** Those provisions must be laid down in a legal instrument, on the basis of the EC Treaty, which can be invoked before a judge. If not, the result would be **legal uncertainty** for the data subject since he cannot rely on the fact that he can invoke the rules before a Court”.

Therefore the first assumption for the transmission of information and mutual assistance among Labour Inspectors is that: **these matters should be previously regulated by legal instruments at European and National level in order to avoid the uncertainty of the regulatory authorities when they use mutual assistance mechanisms because of personal data protection.**

The regulation should follow these basic principles:

- **Defining purposes:** To clearly define the need for collaboration and exchange of LI, especially on OSH-related matters.
- **Proportionality:** As far as possible, to define the content of the requests and the answers: these should be adequate, relevant and not excessive.
- **Transparency:** To publish pre-defined questions.
- **Joint control** and allocation of responsibilities.
- **Right to access,** objection and rectification by data subjects with the exception of data used for criminal proceedings.
- **Limits to retention** of the personal data exchanged.
- Using **privacy notice**

3.1.2 About the sources of information for labour inspection activities

In order to conduct inspections available sources of information on companies, workers and workplaces are essential.

Labour Inspectors usually need to know the companies and workers operating in their territory. They need to be availed of instruments to verify the companies' identity, the location of the workplaces and the nature of their activities. In addition to this, inspectors need information on the most significant incidences in particular work-related accidents and diseases.

Normally employers are obligated to provide or communicate this information to public authorities. Thus there is a relationship between the legal obligations of the employer and the information available to Labour Inspectors.

In the framework of posting companies and workers, both issues present significant deficiencies.

Employers who wish to fulfil their obligations face a daunting task in seeking such information since the legal requirements are different in each Member State; there is a wide diversity of formalities to be observed before the different administrative bodies of the host country with competences on labour, social security, customs and tax issues; as well a language barrier since the host country authorities often provide all the information and formalities only in their official language without any translation into other European languages.

On the other hand, Labour Inspectors must deal with the absence of available information from the employers. Sometimes information received by the national authorities is not at the disposal of the Inspectors (due to a **lack of a National network**) nor do they have access to all the communications received by the authorities of the country of origin (because of a **lack of a European network**). Companies are frequently requested to supply documents already submitted to other public bodies thereby increasing their bureaucratic burden.

/////// SECOND CONCLUSION: THERE IS A NEED TO REGULATE A COMPREHENSIVE INFORMATION SYSTEM ON POSTING AT EUROPEAN LEVEL, IN ORDER TO AVOID DUPLICITIES AND INEFFICIENCIES FOR COMPANIES, WORKERS AND ADMINISTRATIVE BODIES

Currently, posting companies have to fulfil **three types of communications**:

1. Communication of posting to the Social Security Institutions of the sending country

First, in the majority of cases, the employers must submit the A1 form to the Social Security Institutions of their own country (and in their own language) to ensure that their workers remain under their legislation during the posting.

This form should be presented for each posted worker pursuant to Article 15.1 of the Regulation 987/2009.

These forms certify the determination of the applicable legislation to posted workers. Their validity should be recognized by other MS and in those cases where there is doubt about the validity of a document or about the correctness or where there is a difference of views between Member States about the determination of the applicable legislation a dialogue and conciliation procedure should be followed in the

Administrative Commission for the coordination of Social Security Systems (Decision No A1 of 12 June 2009)¹.

In the case that the A 1 form has not been furnished by the competent authorities of the sending Member State the consequence is that the host country authorities may not recognize the implementation of the sending State legislation on Social Security to posted workers and may directly implement their own legislation.

In the long run the information provided on this form will be available in the near future for all National Social Security bodies by virtue of an information system (EESSI), although it would be desirable to have this information available in a European database.

The content of the A 1 form coincides partially with the declaration of posting and currently most posting companies (probably 95%) are required to submit A 1 forms to the National Social Security Authorities of the sending State and the Posting Declaration to the Labour Authorities of the host country.

2. Declaration or communication of posting to the Authorities of the Host Country

Secondly, in many European countries –at least in six MS of Project CIBELES–, companies are required to submit (in the host country language) a prior declaration of posting to the Labour Authority or other competent public Body (such as the Tax Authority in some M.S.) containing data and information about the workplace, posted workers, duration of posting, etc.

This obligation to notify posting to the host country authorities is not actually provided in the Directive 96/71 but it is considered by all the CIBELES team members to be a **necessary condition in order to carry out inspection and enforcement activities on posting companies and workers** since it enables Inspectors to know where the posting companies and workers are carrying out their activities in order to supervise them. This obligation is usually equivalent to other communications that national companies submit before public authorities about the start of their activities.

3. Registration of the company in the host country

Thirdly, in other Member States –at least in two countries of Project CIBELES, in Hungary and in Spain for the construction industry for OSH purposes- posted companies are required to register with the Labour Authorities.

On the other hand, administrative bodies rely on **two European-level information networks**:

1. EESSI (Electronic Exchange of Social Security Information),

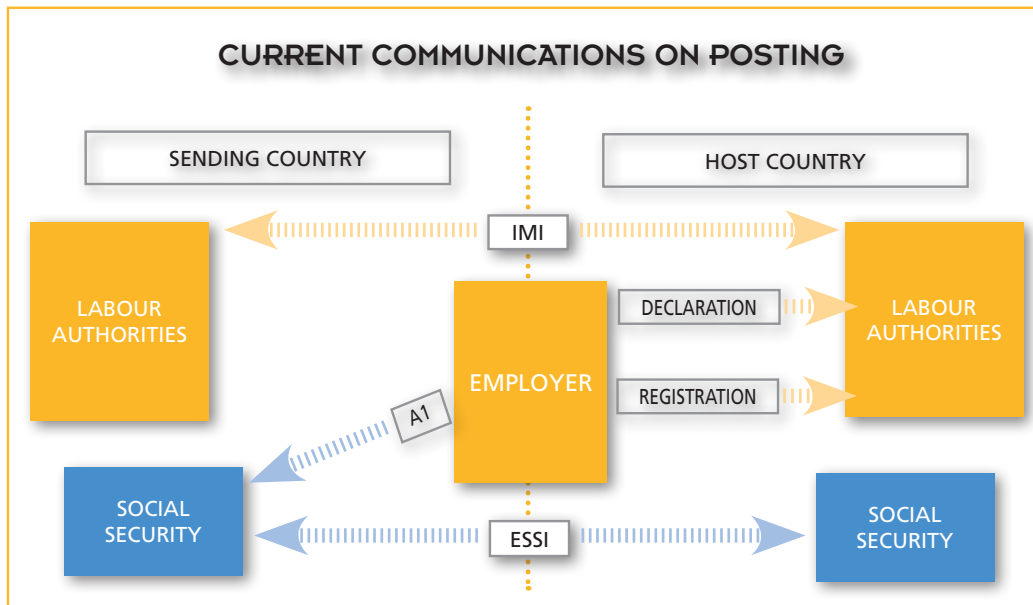
This future network will function exclusively between social security institutions exchanging information upon request.

2. IMI (Internal Market Information System)

This system shall function in the same manner as the EESSI between Labour or Tax authorities for the enforcement of the Posting Workers Directive 96/71/EC.

There will be no connection between IMI and EESSI at European level and in most MS there shall be no connections or network between labour, tax and social security institutions at national level.

¹ Rijksdienst voor Sociale Zekerheid v Herbosch Kiere NV, ECJ Case C-2/05 –re social security contributions payable by migrant EU workers– 26.1.06



Our proposals:

FIRST PROPOSAL: ALL THE POSTING COMMUNICATIONS (A 1, REGISTRATIONS AND DECLARATIONS) SHOULD BE SUBMITTED BY ELECTRONIC MEANS THROUGH AN INTEGRATED AND SIMPLIFIED PROCEDURE AT EUROPEAN LEVEL

The legal provisions of the Member States, granting inspectors the authority to request companies to supply further information about posting, producing documents and so on, could potentially clash with the basic right to free movement of service providers as already considered by the ECJ².

The ECJ even considered that it should be possible for mutual assistance between MS to function properly without this kind of provision: “it should be noted that the organised system for cooperation and exchanges of information between Member States, as provided for in Article 4 of Directive 96/71, will shortly render superfluous the retention of the documents in the host Member State after the employer has ceased to employ workers there”³.

However, these problems could be overcome through a **win-win strategy**. It would be necessary to improve the obligations for the employers and the ways to fulfil them at European and national level in order to simplify and unify them, and on the other hand, it would be profitable to grant Labour Inspectors access to all the information already received by other public bodies of any kind.

In summary: posting should be easier for companies and workers and at the same time it also should be easier to enforce the rules of the Directive 96/71/EC by European Labour Inspectorates and other administrative bodies.

² Judgments of the Court of 23 November 1999 Joined cases C-369/96 and C-376/96 (Arblade), 19 June 2008 Case 319/06 (Commission v. Luxembourg) and 7 October 2010 Case C-515/08 (Santos Palhota)

³ Paragraph 79, Judgment Arblade

This is our proposal: **all declarations of posting (posting declarations, registrations and A1 forms** where these relate to posting) should be entered in a web based EU database (EU server) as this will better guarantee the use of all the European languages and the equal treatment of all companies wishing to post workers to provide services in other EU country. Using European platforms is also a way to ensure that information about legislation and collective labour agreements applicable in all the European countries is more readily available.

On the one hand, European companies should be able to use these web-based platforms avoiding duplicities in the content of their communications and giving the employers also permanent access to their own files.

On the other hand, Administrative bodies would be better placed to obtain information about posting aiming to proactively avoid fraud and legal abuse. If Administrative bodies know of the communications on postings provided by the companies they will be in a better position to manage the information networks.

If Labour Inspectors and other regulatory authorities had access to data bases on A1 posting-related forms it would be not necessary to include the information which is already available in the A 1 forms in the Declarations of Posting or to request companies for this information thus avoiding useless bureaucratic burdens.

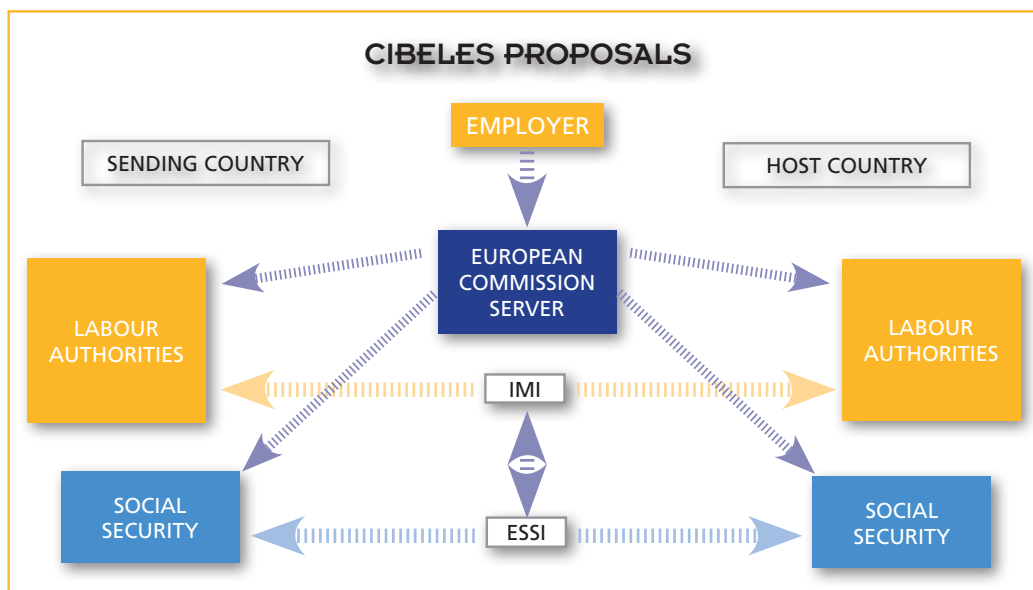
This facility should be advertised in all public electronic means, forms and offices to ensure legal certainty and compliance with data protection regulations.

Regulatory authorities, including Labour Inspectors, should be granted reciprocal access to this database via national coordinators: a host state has access to its citizens who are posted in another MS and the inspectors of the sending State have access to the citizens from another MS coming into their territory for posted work⁴.

The new duty to declare posting and the access of the European Labour Inspectors to this information and EESSI (A 1 forms) would be provided by a legal instrument in order to comply with the rules and principles of data protection.

This measure could be applicable to all posting procedures or only to specific (high risk) sectors.

⁴ Chapter 3, Section 7 (4.1.2.) Fabienne Muller



Executing this proposal would entail the coordination of procedures but not necessarily the harmonization of national legislations. Member States could maintain their own legal requirements about the communications of posting by European companies.

SECOND PROPOSAL: A MEASURE FOR THE EUROPEAN LEGISLATIVE HARMONIZATION OF THE COMMUNICATIONS ON POSTING

This proposal goes a step further. We consider that, besides the A1 form, Labour Inspectors need further information about the posting to carry out their enforcement tasks.

All the participating countries in Project CIBELES, except Italy, which is preparing rules to regulate this⁵, require posting companies to submit a prior Declaration or Registration to posted companies.

In order to ensure legal certainty and avoid legal confusion for posting companies which may arise from the different legal formalities in each country, we consider it essential that all the posted companies and workers be subject to the same legal requirements to communicate posting in all European countries. Therefore, we suggest **establishing a legal requirement to submit a uniform European mandatory declaration to the regulatory authorities of the host countries.**

Minimum content for the Declaration of Posting at European level

The **posting declaration should at least contain the following information according to the guidelines of the ECJ judgments.** The ECJ has considered that this declaration cannot be equivalent to an authorization and its content should be proportional to the needs of the inspection authorities.

This posting declaration should follow a uniform format or model imposed by the European “enforcement” legal instrument (preferably a Directive) before the posting starts.

⁵ Chapter 4 Section 7 Report on Italy (Section 1)

Reasonable exceptions should be provided for academic staff, business meetings, trainings, conferences, very short after sales in production settling of sold goods, etc.

A uniform/standard European form should include at least the following elements:

For the purpose of conducting inspections we consider the declaration of the following elements to be essential:

a. For employees or self-employed persons:

- identification data
- the commencement and termination dates of the posting in the host State
- the type of services to be provided in the host state or the economic sector (see definition of posting in 96/71/EC)
- the place (address) in the Host state where the activities will actually be performed
- the identification data of the client (recipient) or principal in the Host state (name, address)
- the weekly working hours of the employee
- the time schedule of the employee

b. The posted employer's identification data (name, address, MS where it is established, European activity "NACE" code , identity and contact references of a representative during the posting.

c. It could also include **OSH-related data** such as medical examination of posted workers, training, OSH services, etc.

Another option to be considered could be that the "enforcement" instrument should obligate Member States to impose that clients or recipients in the host State file a limited declaration to the local labour inspection in case that the foreign employer has omitted to declare posted workers.

In the Belgian LIMOSA system this is most useful in combination with the mandatory declaration.

With regard to the already existing national databases on posting declarations in Belgium, Austria and Portugal, double use should be avoided and links or networks between databases could be a possible solution.

A deadline for submission

A deadline for submission of the Declaration and A 1 forms should also be instated, preferably always at the latest, the moment when the posting commences.

THIRD PROPOSAL: AS A DISUASORY MEASURE MEMBER STATES' LEGISLATION SHOULD PROVIDE THAT SEVERE SANCTIONS BE IMPOSED FOR FAILURE TO DECLARE, LATE SUBMISSION OF DECLARATIONS AND FALSE OR INCOMPLETE DECLARATIONS

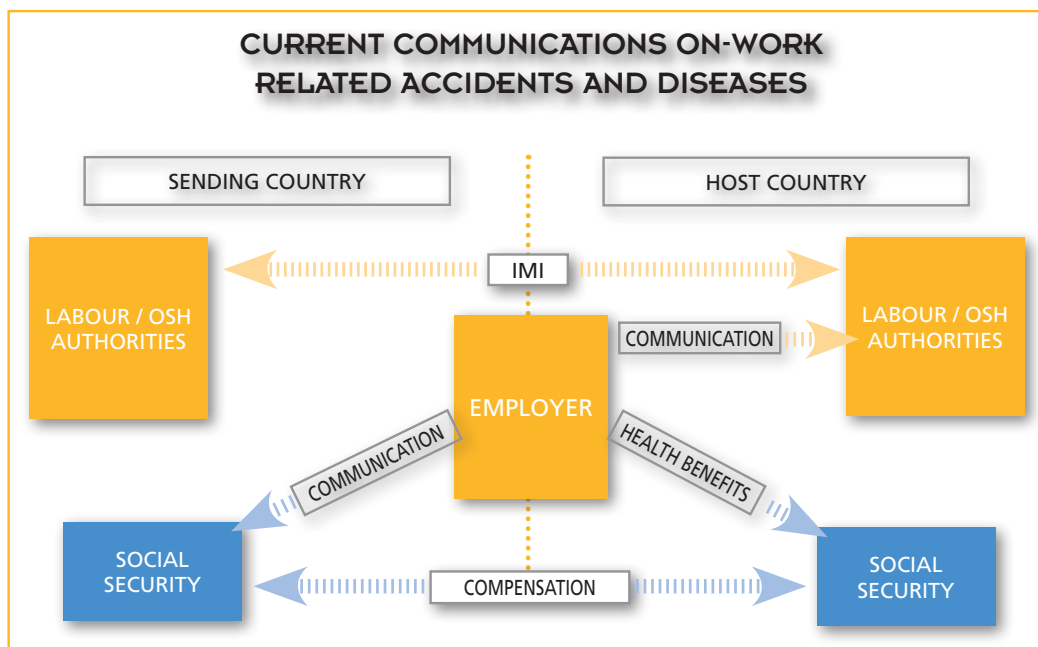
The on-line confirmation receipt delivered by the system serves as evidence of compliance.

In order to guarantee double criminality, effectiveness and cross-border execution of the sanctions legislations on breaches, posting declarations and communications should be harmonised.

FOURTH PROPOSAL: NOTIFICATION OF WORK RELATED ACCIDENTS AND OCCUPATIONAL DISEASES RELATING TO POSTED WORKERS TO LABOUR INSPECTORATES THROUGH A EUROPEAN INFORMATION SYSTEM

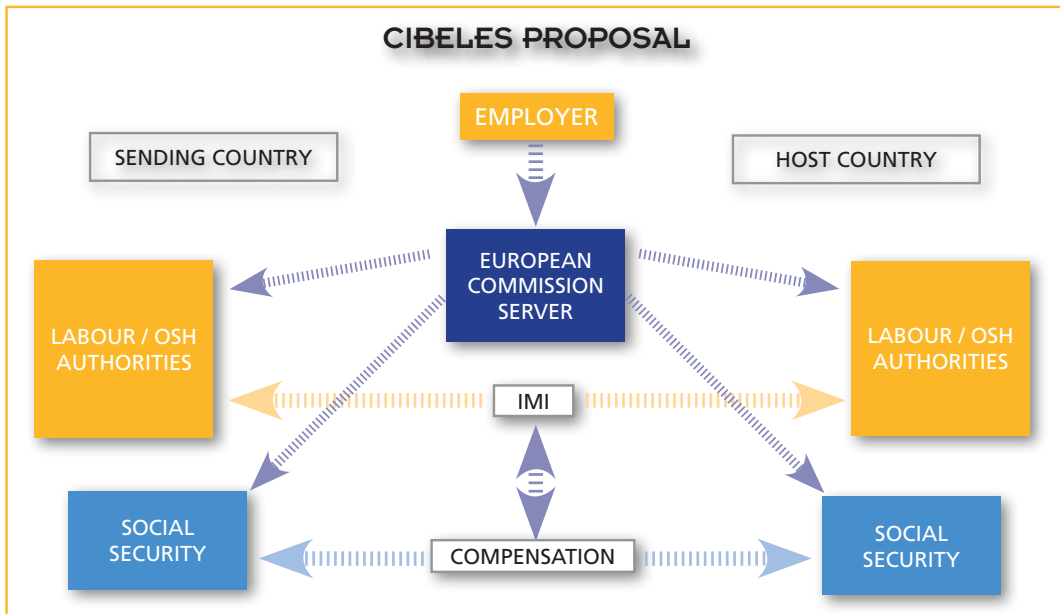
According to article 34 of the Regulation 987/09, in case of posting the declaration or notification of work-related accident or illness shall be addressed to the competent institution of the country of origin. Paragraph 2 states that “the institution of the Member State in the territory of which the accident at work occurred or in which the occupational disease was first diagnosed, shall notify the competent institution of medical certificates drawn up in the territory of that Member State”, and the paragraph 3 provides for mutual assistance mechanisms between competent authorities in order to determine any entitlement to relevant benefits.

Posting companies should notify the competent Social Security institution of the country of origin of any work-related accidents and diseases, likewise in most cases, the Labour authorities of the host country. The former notification is necessary in determining the benefits and the latter has been established to investigate OSH conditions by Labour Inspectors.



At present, Social Security institution is usually notified for the purpose of obtaining benefits but notification is not always submitted to the Labour authorities. In order to **avoid fraud, double bureaucracy and underreporting** it has been ruled in many countries that both notifications should follow the same procedure or at least there should be a link between them.

Therefore in this matter our proposal would be that the reporting of work-related accidents and occupational diseases of posted workers should be notified to the Social Security institutions of the country of origin and to the Labour Inspectors of the host country in a single or coordinated procedure.



FIFTH PROPOSAL: PROVIDING POSTED WORKERS WITH A EUROPEAN IDENTITY CARD THAT CAN BE PRESENTED TO LABOUR INSPECTORS UPON REQUEST

Labour Inspectors also need to be able to identify posted workers in the workplace. The most common instruments for this purpose are national identity cards, passports (if there are any at all) and A1 forms, the authenticity of which cannot be verified by Inspectors. Moreover, A1 forms are often missing at the workplace or can be delivered by the sending country with retroactive effect.

This makes it especially difficult to combat absolute fraud in posting: workers who are established permanently in the host country in order to avoid the control of regulatory authorities.

The first option would be to embed this new functionality in the European Health Insurance Card (EHIC).

The European Health Insurance Card (EHIC) has been implemented under the Social Security regulations. This allows anyone who is insured or covered by a statutory social

security scheme to receive medical treatment in the host MS. We propose that this card could have other functionalities such as the identification of posted workers in the presence of Labour Inspectors.

The problems related to fake A1 forms would be significantly reduced and it would assist workers and companies in their dealings with Labour Inspectors in enforcement actions. Posted workers frequently are entitled to an EHIC and therefore it does not entail an additional administrative burden for them.

A second option could be to follow the example of the STORK project to establish a European eID Interoperability Platform that would allow citizens to establish new e-relations across borders, just by presenting their national eID.

A third option could be a “photographic posting identification card” provided by the authority issuing the A1 form.

Lastly, a fourth option would not be an identification document per se, but rather a list of employees providing full names and Social Security numbers. This documents would be kept at the workplace by the employer at all times for the duration of the posting. would be kept at the workplace by the employer at all times for the duration of the posting.

3.1.3 About the legal regulation of mutual assistance in the investigation breaches

/////// **THIRD CONCLUSION: THE EUROPEAN LEGAL REGULATION SHOULD COVER ALL TYPES OF MUTUAL ASSISTANCE IN THE INVESTIGATION OF BREACHES BY LABOUR INSPECTORS**

All the European Member States have ratified ILO Convention No 81 on Labour Inspection. According to this Convention investigation of breaches are conducted by Labour Inspectors at their own initiative or in response to a complaint **as part of administrative proceedings**. Article 17, paragraph 2 of the Convention states that “it shall be left to the discretion of labour inspectors to give warning and advice instead of instituting or recommending proceedings”.

The only exception would be investigations conducted by the judicial authorities, as is sometimes the case in a few MS.

After analysing the current legal instruments on mutual assistance at European level we should conclude that **the only form of mutual assistance regulated at European and National level which involves all Member States is the request for information on posting companies and workers pursuant to article 4 of the Directive 96/71/EC**. Other modalities of mutual assistance currently put in practice are those related to technical cooperation without the involvement of personal data (KSS) or those arranged by bilateral agreement whose scope, content and effectiveness can vary considerably.

Other types of mutual assistance are also provided in the Convention on Mutual Assistance in Criminal Matters (2000) and Convention 094 of the Council of Europe: European Convention on the Service Abroad of Documents relating to Administrative Matters, Strasbourg 24.XI.1977. However these conventions can only be applied to some Member States and no experience has been recorded of Labour Inspectorates using such mechanisms of mutual assistance.

Lastly, the third is the **national legislation of some MS** (Belgium, Spain, France and Hungary) that regulates mutual assistance between Inspectorates but is only applicable in their jurisdiction.

The conclusion is that there is still a need for regulation on Mutual Assistance in Labour Inspectorate investigation of breaches and that this be legally binding for all MS.

SIXTH PROPOSAL: A MEASURE TO REGULATE ALL FORMS OF EXCHANGE OF INFORMATION AMONG LABOUR INSPECTORS

Exchange of information should encompass the following forms:

a. Requests for information

An Inspectorate requiring information or data about an enquiry may request this of other Inspectorates or public monitoring Authorities.

Such requests should include information available to the requested Labour Inspectorate as well as information that can be obtained through research or investigation conducted by the Labour Inspectors of the recipient country.

Requests for information should always include the right, and the obligation, of the Authorities competent for the posting directive to engage in cross-border communication and to exchange information about findings and enquiries concerning posted workers, including personal data.

Currently IMI is the only Mutual Assistance instrument provided in Directive 96/71/EC and there is no objection on data protection since article 4 of the Directive has been transposed into National legislations.

However this system is only referred to as a form of mutual assistance: neither the request for information nor this regulation not determine whether the receiver should provide only the information already available or if it is also required to carry out the necessary investigation to obtain this information and then transmit it to the applicant.

b. Spontaneous information

This usually relates to offences and infringements of rules of law the punishment or handling of which falls within the competence of the authority of other Member State at the time the information is provided. Spontaneous information may also be related to alerts about labour inspection activities, especially on OSH-related matters.

c. Technical cooperation

Technical cooperation refers to exchange of information on National legislation, on products such as machinery, dangerous agents, best practices, products, safety topics, scientific knowledge sharing, etc., on inspection procedures on OSH-related matters.

Some of the above mentioned information exchanges require communication of personal data, otherwise the control and enforcement of cross-border work situations and protection of the workers is not possible at all. Therefore, they should be legally regulated at European and national level.

SEVENTH PROPOSAL: TO REGULATE ALL FORMS OF PHYSICAL OR ACTIVE COOPERATION AMONG LABOUR INSPECTORS AT EUROPEAN LEVEL

The current Article 4 of the Directive 96/71/EC provides that Member States shall make provisions for cooperation between those public authorities which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment referred to in Article 3.

However, the only form of cooperation provided is “*replying to reasoned requests for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities*”.

Other forms of cooperation which entail joint tasks should be also regulated:

a. Hearing of witnesses

This is necessary in the investigation of breaches when the posting company has left the host country or the actions have been planned in other country, especially when reconstructing the facts surrounding a work-related accident.

b. Joint enquiry teams

Transnational working groups of Inspectors may be required for the purpose of coordinating transnational cross-border sites, to control companies doing business simultaneously in several countries, to control transport, or for joint teams formed by the sending and host country inspectors to control posted workers as well as for simultaneous actions or joint teams for cooperation in European or transnational campaigns, among others.

The Directive should provide Authorities competent for the posting directive, the right to participate in simultaneous trans-border actions on a mutual basis, to attend hearings, or set up joint teams.

c. Support in enforcement procedures

Since the Council of Europe’s Convention 094 has been ratified by few Member States the regulation of this kind of assistance at European level is necessary to provide support in the notification of administrative acts and judicial procedures as well as in the execution of fines.

EIGHTH PROPOSAL: TO CONSTITUTE A EUROPEAN NETWORK OF EXPERTS ON OSH THAT IT COULD BE CALLED EUROSOSH

A network of experts in the Inspectorates on Occupational Safety and Health (EUROSOSH) should be created in order to facilitate the technical assistance to Labour Inspectors in these matters, to organise training and information actions at European level as well as to collect data or evidences between Labour Inspectors without jeopardizing other networks on labour inspections matters.

This network, unlike others would not operate upon request as an IMI but in a proactive manner, facilitating technical assistance to Labour Inspectors on OSH matters and organising training and information actions at European level.

NINTH PROPOSAL: REGULATING THE LEGAL EVIDENCE VALUE OF EXCHANGED INFORMATION TO BE USED BY INSPECTORS IN THEIR ENQUIRIES

There is not any mention in the current European legislation on this subject and it is only regulated by some national legislations namely Belgium⁶ and Spain⁷.

It would also be desirable for the new Directive to regulate the legal evidence value of exchanged information to be used by inspectors in their enquiries, to ensure it is awarded the same legal value as their own “de visu” findings.

This should also apply to findings resulting from joint actions or active assistance in enquiries.

TENTH PROPOSAL: CLARIFYING THE SCOPE OF NATIONAL LEGISLATIONS ON OCCUPATIONAL SAFETY AND HEALTH IN POSTING OF WORKERS

Some of the rules to be applied by the sending country in terms of certain acts or business, need to be further clarified especially regards services such as medical surveillance, occupational health and safety services and training.

Only some national laws regulate the scope of OSH rules for posting companies with regard to these services. It is advisable in any case to avoid double regulations or loopholes.

ELEVENTH PROPOSAL: PROVIDING A LEGAL BASIS FOR BILATERAL AGREEMENTS ARISING FROM A EUROPEAN LEGAL INSTRUMENT.

Essentially, Labour Inspectorates have the same powers but not the same competences. Any future legal framework will need to be flexible and provide for all these eventualities. Mutual Assistance must be adapted to different situations and whenever feasible be provided through multilateral or bilateral agreements which complement the legislation.

The legal regulation should provide a legal basis to Bilateral (or multilateral) agreements that focus on the same scope of this “enforcement” instrument, but where parties go further in the reciprocal engagements. More specifically, the preconditions of such agreements should be defined by this regulation.

Moreover this is a common practice in European Regulations and Directives on mutual assistance for providing a broader legal basis⁸ without prejudice to other agreements that might be signed between MS outside of this legal framework.

⁶ Chapter 4 Section 1 Report on Belgium (Section 3)

⁷ Chapter 4, Section 9 Report on Spain (Section 3)

⁸ E.g. Article 24.1 of Directive 2010/24/EU and Article 86 Regulation 883/04, Annex I of the Regulation 987/09

This legal basis should also cover the issue of personal data privacy and that of legal evidence.

3.1.4 Fines and the execution of fines

/////// FOURTH CONCLUSION: WE DO NOT AS YET HAVE A LEGAL INSTRUMENT REGULATING FINANCIAL PENALTIES PROPOSED OR IMPOSED BY ALL THE EUROPEAN LABOUR INSPECTORATES

With regard to the application/enforcement of the Framework Decision 2005/214/JHA, some Member States do not accept it in case of administrative fines which can be appealed before courts other than criminal courts.

The scope of Article 5 of the Framework Decision does not expressly include Occupational Safety and Health offences however, paragraph 3 states that for offences other than those covered by paragraph 1, the executing State may recognise and execute a decision subject to the condition of double criminality in both Member States.

This Framework Decision could be amended but, on the other hand, some Labour Inspectorates do not prosecute criminal offences but only administrative fines and therefore their activities cannot be included in article 87 TFEU nor in Title V TFEU on Freedom, Security and Justice.

The Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, includes administrative penalties in its scope but the OSH-related fines do not relate to the legal duties on public incomes.

TWELFTH PROPOSAL: A LEGAL INSTRUMENT REGULATING MUTUAL RECOGNITION AND EXECUTION OF ALL TYPES OF FINANCIAL FINES

Given that the FWD 2005/214 and the Directive 2010/24 are not consolidated legal instruments with which to execute fines promoted or imposed by other Labour Inspectorates nor can they be fully applied except for in a few Member States, a better option would be to regulate mutual assistance or mutual recognition for the execution of all the types of fines promoted or imposed by the European Labour Authorities⁹ in a specific legal instrument.

This legal instrument should encompass all the fines, be they of criminal or administrative nature, regardless of which tribunals or courts are competent for dealing with appealing against administrative fines.

THIRTEENTH PROPOSAL: A EUROPEAN REGULATION ON THE EXECUTION OF ADMINISTRATIVE FINES FOR OSH OR POSTING-RELATED MATTERS THAN CAN BE APPEALED BEFORE NOT ONLY CRIMINAL COURTS

⁹ Chapter 3 Section 4.- Prof. Alfonso Ybarra Bores

The difficulty entailed in achieving global regulation of all manner of administrative and criminal fines at European level must be acknowledged. On the other hand, criminal or administrative penalties subject to appeal before criminal courts can already be executed under Framework Decision 2005/214/JHA although the content of the instrument could be enhanced by adding OSH fines to its scope.

For that reason, another more feasible solution might be to approve a new instrument for cross-border execution of administrative fines related to posting that may be appealed before not only criminal courts (the scope of Article 3 of the Directive 96/71/EU which includes OSH) pursuant to Article 114 TFEU and in the domain of occupational safety and health pursuant to Article 153 TFEU.

FOURTEENTH PROPOSAL: HARMONIZATION OF OSH AND/OR POSTING-RELATED INFRINGEMENTS

Double criminality is a usual precondition for mutual assistance and mutual recognition in the execution of financial fines and therefore this principle could jeopardize the implementation of the previous proposal.

Therefore there is still a need to determine which posting and occupational safety and health-related infringements might be invoked (as this is possibly a very extended issue) and regulate this matter following the example and the guidelines of the Directive 2009/52/EC providing for minimum standards on sanctions and measures to be imposed on employers of third-country nationals who do not have legal status.

This regulation could include a common liability regime for salary debts of posted companies and common minimum Occupational Safety and Health infringements.

In any case, this proposal would require a preliminary study on breaches and sanctions in these matters.

3.2 LEGAL BASIS FOR PROJECT CIBELES PROPOSALS

Mutual Assistance with other public bodies, be they national or from abroad, is vital for Labour Inspectorates¹⁰.

At National level, in order to coordinate actions and cover all competences, Labour Inspectorates need a Mutual Assistance Network to work with other Administrative bodies. Labour Inspectors need to have access to data bases and information on the activities carried out by other public bodies and vice versa¹¹.

At European level, a Mutual Assistance Network of Labour Inspectors from different Member States is a must for Technical Cooperation on OSH matters in order to monitor compliance with European legal rules in the equivalent manner. It is also important to obtain information from other EU countries regarding their enforcement procedures to better understand each MS national legal rules and practices.

¹⁰ Chapter 3 Section 7 (Background) Fabienne Muller

¹¹ With regard to the mutual assistance in national networks it is interesting to read Chapter 4: Section 1 Report on Belgium (Section 2); Section 4 Report on France (Section 2); Section 5 Report on Austria (Section 2); Section 6 Report on Germany (Section 2); Section 7 Report on Italy (Section 2); Section 8 Report on Portugal (Section 2) and Section 9 Report on Spain (Section 2)

Technical cooperation among Labour Inspectorates is necessary to ensure an equivalent implementation of the OSH Directives and may involve mechanisms for exchange of information or the reactive or proactive creation of joint teams for common enquiries (e.g. in European SLIC campaigns).

In the course of enforcement procedures, mutual assistance at European level may be necessary in matters related to the **free movement of goods** within the Internal Market when inspectors monitor the way workers use products or agents coming from other countries and need information on those products in the country of origin.

In enforcement procedures relating to the **posting of companies and workers** for the free provision of services Inspectors need the collaboration of the regulatory authorities from other countries in order to obtain information that will be useful to their enquiries. This is particularly important when the company has left the country or when the information can only be obtained in the country of origin.

These are in summary the legal principles and grounds for our proposals on mutual assistance in matters of legal enforcement:

3.2.1 Principles of Project CIBELES proposals

A) PRINCIPLE OF SINCERE COOPERATION

As it is stated in the Treaty of the European Union **pursuant to** Article 4.3 TEU:

- “the Union and the Member States shall, in full mutual respect, **assist each other** in carrying out tasks which flow from the Treaties”;
- “the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union”
- and “the Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives”.

The strategies on safety and health at work (OSH) adopted by the Council and the Commission have already underlined the significance of an equivalent implementation of the OSH Directives. The 2002-2006 strategy stated that the Commission “will also be cooperating closely with the national authorities to find ways of ensuring that the **Community directives are implemented correctly and equivalently**. In this respect, a core and strategic role should be played by to the Senior Labour Inspectors Committee (SLIC) in terms of **encouraging exchanges of information and experience and organising mutual cooperation and assistance**”.

The current Community strategy 2007-2012 on health and safety at work insists on this point and states that “national legislations transposing the Community *acquis* on health and safety at work **should be applied effectively and in a uniform manner** in order to guarantee comparable levels of protection in all the Member States”.

Mutual Assistance is necessary to achieve these aims, regulating technical cooperation mechanisms on exchange of information, training of Inspectors, and joint teams of inspectors in transnational reactive or proactive inspection campaigns such as those currently organized by the SLIC and Member States through multilateral or bilateral agreements.

On the other hand, Mutual Assistance is necessary to reach the targets of article 4 TEU. For that reason its use and normal practice should be promoted by the European Commission and Member States.

B) THE PRINCIPLE OF EQUAL TREATMENT

The third ground is the principle of equal treatment of European citizens who shall receive equal attention from its institutions, bodies, offices and agencies (Article 9 TEU). Enforcement actions should have the same treatment and effectiveness on companies and workers regardless of their nationality.

In order to improve occupational safety and health (OSH) throughout the European Union and to ensure equal treatment between resident and non-resident offenders, enforcement should be facilitated irrespective of the Member State in which the company, which has committed an offence, is established. To this end, a system of cross-border mutual assistance among labour inspectorates should be put in place.

As we shall demonstrate, sanctions imposed for offences committed in the territory of Member States other than the company's country of establishment are most frequently not enforced¹².

This relative impunity undermines the objectives of the European OSH Directives and encourages companies not to respect national OSH rules in the host Member States because they feel that the sanctions will not be enforced. It also undermines the legitimacy of these controls in the eyes of National companies generally who could call them into question, arguing that all the companies which carry out a job in the same territory must be treated equally by regulatory authorities.

C) THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

Finally we should take into account that the objective of this Project, namely facilitating proposals for mutual assistance and cross-border enforcement especially on OSH offences, the proposals regarding the measures that the EU may adopt should be in accordance with the **principle of subsidiarity** enshrined in Article 5 of the Treaty: they cannot be sufficiently achieved by the Member States themselves and can therefore, by reason of their scale effects, be better achieved at European level.

Therefore the proposals will focus on enabling mutual assistance and cross-border enforcement when Member States have been unable to achieve their targets through unilateral or bilateral activity to date.

Besides, in accordance with the **principle of proportionality** set out in the mentioned Article, these measures do not go beyond what is necessary in order to achieve the objective.

3.2.2 Grounds for Project CIBELES proposals

A) ENFORCEMENT OF THE NATIONAL LEGISLATION ON OSH WITHIN THE FRAMEWORK OF THE INTERNAL MARKET

Enforcement of OSH rules relates to the functioning of the Internal Market with regard to the free movement of goods which can affect OSH (such as machinery or dangerous agents) pursuant to article 28 TFEU and with regard to the free provision

¹² Chapter 3 Section 4.- Prof. Alfonso Ybarra Bores

of services and particularly the posting of companies and workers pursuant to **Article 56 TFEU** and the Directive 96/71/EC on posting of workers.

In this Directive OSH rules are, among other working conditions, within the “terms and conditions of employment that undertakings should guarantee workers posted to other Member State” (Article 3 of the Directive 96/71/EC).

Occupational Safety and Health is a relevant matter for posted workers, as we have found in the activities of this project that most of the posted workers carry out their activities in subcontracting companies of the construction industry or other temporary services. The most remarkable “advantages” of these companies consist in lower costs in wages, social security, etc., occasioning **social dumping**, the posted workers’ acceptance of lower standards and widespread false posting. The posted workers’ conditions entail higher risks of fatigue, no training provided, absence of mandatory protective equipment, sub-standard housing and dangerous transport¹³.

Enforcing the OSH national legal rules to posted companies and workers entails the need of cooperation and mutual assistance among Labour Inspectors from different Member States.

Moreover Article 3 is also referred to other matters relating to some Labour Inspectorates such as “maximum work periods and minimum rest periods” and “minimum paid annual holidays” whereby all the Inspectorates of Project CIBELES except Malta¹⁴ are involved, and also other matters such as “the minimum rates of pay, including overtime rates”, “the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings”, “protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people” and “equality of treatment between men and women and other provisions on non-discrimination” whereby the Inspectorates of France, Portugal, Hungary, Italy, Belgium and Spain are also involved¹⁵.

On the other hand, the implementation of article 56 TFEU and the Posting Workers Directive is a complex matter that also entails the application of Social Security Regulations 883/04 and 987/09 for posted workers. Those Regulations include communications on posting and the treatment of declarations and benefits on work-related accidents and occupational diseases for posted workers. This can be also related to the Labour Inspectors OSH-related activities which need to be coordinated.

Lastly, posting activities can also be related to the implementation of national tax legislations on posted companies and workers and can entail the intervention of the tax authorities as is the case in Austria, Germany and Portugal¹⁶.

Requirements for Mutual Assistance not only affect Labour Inspectorates but also other public bodies such as the Social Security, Customs and Tax administrations¹⁷.

¹³ Chapter 3 Section 1 Prof. Justin Byrne.

¹⁴ Chapter 4 Section 2 Report on Malta (Section 2).

¹⁵ See also below paragraph 3.1 of this Chapter.

¹⁶ Chapter 4, Section 5 Report on Austria (Section 2); Section 6 Report on Germany (Sections 2 and 4) : Section 8 Report on Portugal (Section 1)

¹⁷ Chapter 3 Section 2 María Luz Vega (ILO) states the experience in Norway (Kirkeness) and other countries.

Enforcement activities of the Labour Inspectorates on posted companies and workers could be especially significant bearing in mind that only very few cases involving posted workers have so far been brought before national labour courts¹⁸.

However, in the framework of the Internal Market enforcement provisions for Labour Inspectorates are not focused on the protection of workers (a sanction which prevents employers from abusive employment practices) but on the proper functioning of the Internal Market (a sanction which prevents employer from social dumping)¹⁹ since posting of workers is an area often rife with fraud²⁰.

A MEASURE ADOPTED ON THE GROUNDS OF ARTICLE 114 TFEU

Within the Title IV TFEU and pursuant to **Article 114 TFEU** paragraph 1 “*save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26 (the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital). The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, **adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market***”.

This measure could be adopted for mutual assistance in the enforcement of rules on the free movement of goods relating to OSH (Article 28 TFEU) and the posting of workers (Articles 48 and 56 TFEU) **when they entail dumping or malfunctioning of the Internal Market**²¹.

In the Work Programme of the European Commission for 2011 it is stated that the general objective “to improve the implementation and application in practice of Directive 96/71/EC on Posting of Workers. As specific objectives one should ensure the effective respect of the posted workers rights, the clarification of the obligations of national authorities and the clarification of the role of trade unions and social partners in general in the framework of the Directive.”

This Directive could implement 11 Cibeles Project proposals:

1. Scope

The scope of this Directive could cover all matters relating to article 3 of the PWD 96/71/EC or, in any case, the nucleus, hardcore obligations of employers resulting from the transposition of aspects which directly affect the functioning of internal market: wages, working time and occupational health and safety.

2. Regulating the scope of national legislation on OSH

The Directive could regulate what law is applicable to certain services as training, medical service or in general to occupational safety and health services (Proposal n. 10).

3. The forms and means of posting declaration

This Directive would regulate the declarations of posting and the electronic submission of said declarations (Proposals No 1 to 4).

¹⁸ Eurofound, Posted workers in the European Union (2011).

¹⁹ Chapter 3, Section 6 Belén Plaza Cruz.

²⁰ Chapter 3, Section 7 (Introduction) Fabienne Muller.

²¹ Chapter 3 Section 1 Prof. Justin Byrne

4. The forms of mutual assistance

The Directive should regulate all the forms of mutual assistance (Proposals No 6 and 7), Labour Inspectors access to ESSI (Proposal No 1), the use of the EHIC to identify workers (Proposal No 5) and bilateral agreements (Proposal n. 11).

5. The legal value of evidence obtained by Mutual Assistance

The Directive should award legal value to such evidences ensuring it the same legal value as evidence obtained by national Labour Inspectors (Proposal n. 9).

6. The execution of fines

This Directive can regulate mutual recognition and execution of an administrative nature relating to the matters enshrined in Article 3 PWD (Proposal No. 13).

B) COOPERATION IN THE AREA OF FREEDOM, SECURITY AND JUSTICE

Pursuant to **Article 74 TFEU** «the Council shall adopt measures to ensure **administrative cooperation** between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament”²².

These measures could be adopted if labour inspection activities can be considered within the framework of Title V TFEU (Area Freedom, Security and Justice).

As we have analysed in the Chapter 6 there are Labour Inspectorates for whom the penal or criminal judicial procedures are the most relevant (France, Malta, Italy). In other cases however, the punishment procedures are strictly administrative (Portugal, Austria, Germany, Hungary, Spain) and others with a mixed system (Belgium).

Consequently, the legal status of Labour Inspector is also different in each country. In some countries Inspectors prosecute criminal and administrative offences and in others they only prosecute administrative offences.

This consideration is relevant for the application of article 87 TFEU (ex article 30 TEU) on “police cooperation” which also involves “other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences”.

The legislative measures provided in paragraph 2 of article 87 for “the collection, storage, processing, analysis and exchange of relevant information”, “the training of staff” and “common investigative techniques” would not be applicable to several European Labour Inspectorates.

On the other hand, Article 67.3 TFEU states that “the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in **criminal matters** and, if necessary, through the approximation of **criminal laws**”.

As we have analysed in this Project the Labour authorities of some Member States such as Belgium, Spain and Hungary consider that the legal regulations based on Title V TFEU such as FWD 2005/214/JHA are not applicable to the administrative infringement procedures initiated by Labour Inspectors.

²² Chapter 3 Section 3 Prof. Julio Pérez Gil

A measure pursuant to Article 74 TFEU could implement several Project CIBELES proposals:

- 1) Scope: the measure should relate to OSH matters and others which can be established by multilateral or bilateral agreements.
- 2) Regulation of Mutual Assistance in all forms (Proposal No 6 and 7).
- 3) The legal value of evidence obtained by mutual assistance (Proposal No 9).

C) MEASURES ON SOCIAL POLICY AND PARTICULARLY ON OCCUPATIONAL SAFETY AND HEALTH

Ensuring fulfilment of the obligations arising out of the Framework Directive 89/391/EEC on Occupational Safety and Health (OSH) and all the Directives derived from Article 153 TFEU is a duty that corresponds to Member States authorities (Article 4.2 of the Framework Directive).

On this matter the following measures could be taken:

- 1) Pursuant **article 153.2.b) TFEU** the European Parliament and the Council may adopt, **by means of directives**, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

Therefore a Directive on mutual assistance for enforcement **on OSH matters** could be adopted.

This Directive could implement five Cibeles Project Proposals:

- a) Notification of work-related accidents and professional diseases of posted workers (Proposal No 4).
 - b) Regulation of Mutual Assistance in all forms (Proposals No 6 and 7),
 - c) The legal value of evidence obtained by mutual assistance (Proposal No 9).
 - d) The harmonization of OSH-related infringements (Proposal n. 14).
- 2) Pursuant to **article 156 TFEU** the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in the field of prevention of occupational accidents and diseases and occupational hygiene.

To this end, the Commission shall act in close contact with Member States by **making studies, delivering opinions and arranging consultations** both on problems arising at national level and on those of concern to international organisations, in particular initiatives aiming at **the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation**. The European Parliament shall be kept fully informed.

These measures could contribute to implement the following three Project CIBELES Proposals:

- a) Guidelines on the applicable OSH legislation for specific services (Proposal No 10).
- b) Guidelines on the content of bilateral agreements (Proposal No 11).
- c) A comparative study on OSH infringements (Proposal No 14).

D) ADMINISTRATIVE COOPERATION

Finally, pursuant to **Article 197 TFEU** the Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include **facilitating the exchange of information and civil servants as well as supporting training schemes**. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting **by means of regulations** in accordance with the ordinary legislative procedure, shall establish the **necessary measures for this end, excluding any harmonisation of the laws and regulations of the Member States**.

A measure pursuant to Article 197 TFEU could implement 10 Project Cibeles proposals:

- 1) Scope: the measure should be relating to OSH matters and others which can be established by multilateral or bilateral agreements.
- 2) The measure could establish information systems among the MS affected on declaration of posting (proposals No 1 and 2), exchange of information on Social Security (proposal No 1), work-related accidents (proposal No 4) and tools to identify workers (proposal No 5).
- 3) Regulation of Mutual Assistance in all forms (Proposal No 6 and 7).
- 4) The legal value of evidence obtained through mutual assistance (Proposal No 9).



Conclusions

First Conclusion: THE RIGHT TO PERSONAL DATA PROTECTION, THE NEED FOR LEGAL REGULATION OF INFORMATION SOURCES AND MUTUAL ASSISTANCE BETWEEN LABOUR INSPECTORS IN ENFORCEMENT PROCEDURES

Second Conclusion: THE NEED TO REGULATE A EUROPEAN LEVEL COMPREHENSIVE INFORMATION SYSTEM ON POSTING TO AVOID DUPLICITIES AND INEFFICIENCIES FOR COMPANIES AND PUBLIC BODIES

FIRST PROPOSAL: all posting communications should be submitted electronically through a European level, integrated and simplified procedure.

SECOND PROPOSAL: a measure for the harmonisation of European legislation on communications on posting.

THIRD PROPOSAL: MS should legislate severe sanctions for failure to declare postings, late declaration and false or incomplete declaration aiming at deterring breaches.

FOURTH PROPOSAL: notification of work related accidents and diseases of posted workers to labour inspectorates through a European information system.

FIFTH PROPOSAL: providing mechanisms with which Labour Inspectors are equipped to identify posted workers.

Third Conclusion: A EUROPEAN LEGAL REGULATION SHOULD ENCOMPASS ALL TYPES OF MUTUAL ASSISTANCE IN INVESTIGATION OF BREACHES BY LABOUR INSPECTORS.

SIXTH PROPOSAL: a measure should regulate all forms of exchange of information among Labour Inspectors.

SEVENTH PROPOSAL: to regulate all forms of physical or active cooperation among Labour Inspectors at European level.

EIGHTH PROPOSAL: to constitute a European network of experts on OSH that could be called EUROSH.

NINTH PROPOSAL: regulating the legal value of exchanged information as evidence to be used by inspectors in their enquiries.

TENTH PROPOSAL: clarifying the scope of national legislation on occupational safety and health in posting of workers.

ELEVENTH PROPOSAL: providing a legal basis for bilateral agreements arising from a European legal instrument.

Fourth Conclusion: WE DO NOT HAVE AS YET, A LEGAL INSTRUMENT REGULATING FINANCIAL PENALTIES PROPOSED OR IMPOSED BY ALL EUROPEAN LABOUR INSPECTORATES

TWELFTH PROPOSAL: regulate mutual recognition and execution of all manner of financial fines at European level.

THIRTEENTH PROPOSAL: a European regulation to execute administrative fines on OSH or posting matters which can be appealed to courts other than the penal ones.

FOURTEENTH PROPOSAL: harmonization of infringements on OSH and/or posting.

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