

# CONCLUSIONS AND PROPOSALS OF THE CIBELES PROJECT

International Workshop  
on Strategic Planning Processes  
Within the Public Sector  
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**MADRID, November 10th 2011**

# Convergence of Inspectorates Building a European Level Enforcement System (CIBELES)

*A PROJECT FOR SETTING UP EUROSH  
(A European Network for Enforcement)*

# PERSONAL DATA PROTECTION

## First conclusion

# PERSONAL DATA PROTECTION

*“the protection of personal data is recognised as a **fundamental right** in the Charter of Fundamental Rights of the Union and in the European Convention on Human Rights (‘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 consequences would be the **uncertainty** for for the data subject and for the monitoring authorities in their acts of mutual assistance.
- It would also provoke potential problems of the **legality of the proof**

# PERSONAL DATA PROTECTION

## **FIRST CONCLUSION:**

As a pre-condition:

**THE NEED TO PERMIT AND USE PERSONAL DATA IN:**

- The **cross-border communication exchanges** between Labour inspectorates of the EU
- Consulting **information sources**

**AND REGULATE THE USE OF PERSONAL DATA in enforcement actions and proceedings.**

**THEREFORE : the NEED for A **LEGAL REGULATION****

# THE NEED TO REGULATE AT EUROPEAN LEVEL AN INTEGRAL INFORMATION SYSTEM ON POSTING

- In order to avoid **DUPLICITIES** and **INEFFICIENCIES** for employers and public bodies
- For preparing and planning of the enforcement & control

## Second conclusion

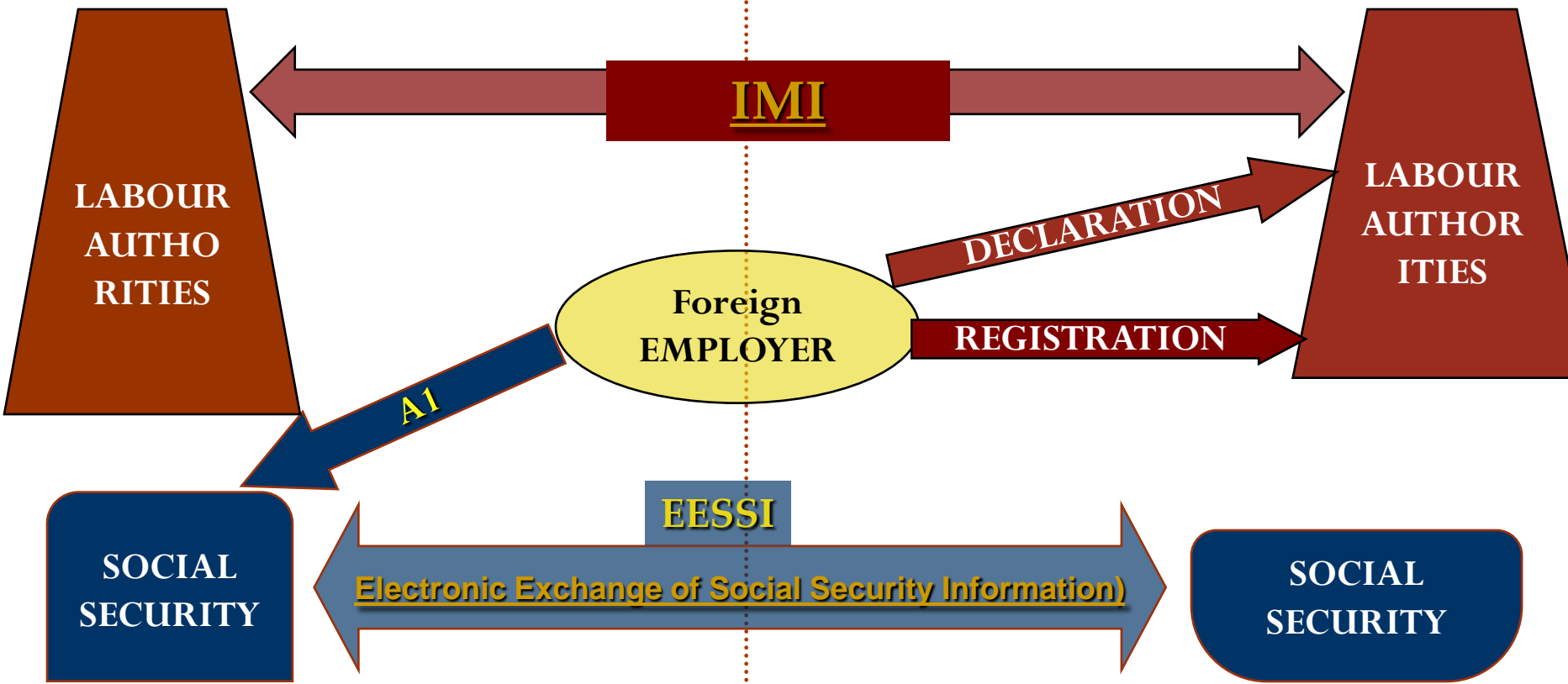
# CURRENT SOURCES OF INFORMATION FOR LABOUR INSPECTORS ON POSTED WORKERS

- **Communications of posting (“how to identify posting situations?”):**
  - ❑ Some system of pre-notification or declaration of posting to the host MS: in 18 of the 27 MS (7 of 9 Cibeles MS)
  - ❑ 13 MS require providing information about posting by the service recipient (client in host state)
  - ❑ Registration of posted companies: in some MS
  - ❑ A1 Social Security form for posted workers: in all MS
- **Communications on work-related accidents and occupational diseases**
  - ❑ To the Social Security bodies (home MS)
  - ❑ To the host country authorities
- **How to identify (posted) workers?**

# Current communications on posting

SENDING COUNTRY

HOST COUNTRY





# Communications on posting

## ✓ THREE PROCEDURES FOR EMPLOYERS

- (1) IN THE SENDING COUNTRY: **A1 form** to Social Security bodies (all MS) (in their own language)
- IN THE HOST COUNTRY (mostly in the host country language)
  - (2) **Posting notification** to Labour Authority (7 MS of Cibeles))
  - (3) **Registration** to Labour Authority (2 MS of Cibeles)

## ✓ TWO INFORMATION NETWORKS FOR AUTHORITIES

- EESSI: exclusively between Social Security bodies (2014 at the earliest!)
  - IMI: usually between liaison offices/and/or labour inspections
1. **There isn't ANY NETWORK between Labour inspections and Social Security institutions at European and national level**
  2. **The NEED of an integrated information system on posting in order to prepare and design inspections & planning & choose targets (most vulnerable situations, abuses & fraud)**

# Cibeles proposals: a win-win strategy

- Simplifying and standardizing procedures for submission of communications by the employers (posting easier for them)
- Simplifying and standardizing communications and information networks for inspection bodies (better enforcement of Dir. 96/71/EC)
- Information on posting as provided in A1, registrations or prior declarations are partially the same. Administrative burden & double use can be avoided. For labour inspectors: only fragmented and partial information from these sources obtainable
- In these information proceedings there's a lack of information for the employers & posted workers about their duties & rights (legislation and collective agreements) in the host MS. This could be better remedied via a joint European (global) information platform

# Cibeles proposals: a win-win strategy

- We propose 2 alternatives for the current declaration systems existing on the national level:
  - a “**light**” version: without adding new mandatory obligations on the national level (no harmonization)
  - a (preferred) “**full**” version with a generalized & standardized mandatory prior declaration introduced by a European legal instrument

This can be in line with the free movement of services in the EU when conditions of the case-law of the ECJ are met (e.g. proportionality)

# 1st Cibeles proposal: “COORDINATION” of all current posting notifications in 1 integrated PROCEDURE on EU level and making all networks “interconnected” (“light” version)

- **ALL THE EXISTING POSTING COMMUNICATIONS** (A1, posting registrations and declarations) should be submitted by electronic means (web service) in 1 integrated procedure at EU level  
= **streamlining** of the communications flow via a EU server  
= without adding “new” obligations for MS – no harmonization)
- **AVOIDING DOUBLE BUREAUCRACY AND ADMINISTRATIVE BURDENS**
  - All authorities in Soc. Sec. & Labour should **have access** to this platform – Employers = **access** to their own files
  - **Avoids double use** of data & information in A1 forms & posting declarations
  - Labour Inspectors would **not have to request** companies for this information (simplification and less administrative hindering)

## First Cibeles proposal: COORDINATION of all networks and posting notifications in 1 integrated PROCEDURE on EU level

Contra for this light version:

1. **Practical & technical difficulties** due to different content & formats in Member States (ICT –wise)
2. Making it **mandatory?** Difficulty by lack of compulsory EU regulation
3. **interconnection with the (closed) EESSI platform:** delayed – operational not before 2014 + differences in application

## 2nd Cibeles proposal: EU LEGISLATIVE HARMONIZATION & INTEGRATION OF all COMMUNICATIONS

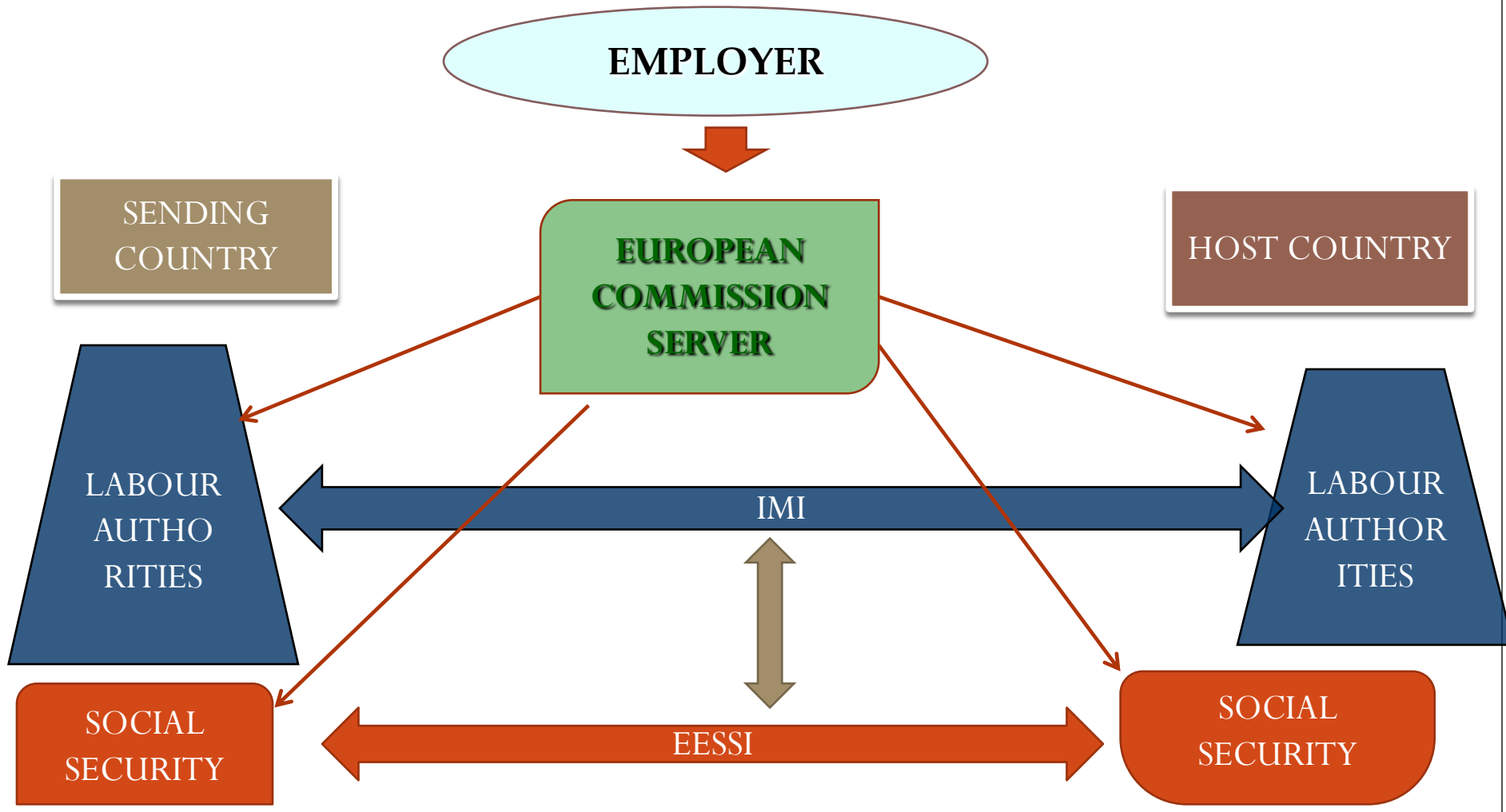
As a **more profound** alternative to current declaration systems: the preferred “**full**” version by Cibeles.

- 7 of 9 participating countries in the Cibeles Project (+ Italy, which is preparing legislation to introduce it), demand posting companies to submit a prior declaration or registration to posted companies. A1 form is not enough + Labour inspections mostly don't have access to A1 databases in their country.
- The obligation to notify posting is not actually foreseen in the Directive 96/71 but it is considered by all the Cibeles team members **necessary to carry out inspection and enforcement activities on posting companies and workers** in order to monitor their rights (who's working where on behalf of whom?).

## Second Cibeles proposal: EU LEGISLATIVE HARMONIZATION OF all COMMUNICATIONS

- The proposal of harmonization is to establish a uniform European **MANDATORY PRIOR DECLARATION OF POSTING** to the enforcement authorities of the Host countries
- In MS where it should be “new” : it is to be considered as the **equivalent** of registration/declaration duty of activity start & workers to be done by the national undertakings to the national bodies – all employers (nationals or foreign) treated equally
- This requires a European legislative initiative to introduce a **generalized, standardized and mandatory prior** declaration system & make it applicable for all posting situations in all MS, or for certain (most risky) sectors .
- Foreign (service providing) employers should submit all their communications (A1, prior posting declaration, registration) via a **web based service on a EU server** (preferable)
- Eu server **forwards automatically** to the sending & host countries
- **LI should have access** to this database & dispose of search tools

# Cibeles proposals





## 3th Cibeles proposal: ensuring the effectiveness of the legal duties concerning posting declarations

- The EU enforcement legislative instrument should compel Member states to provide **SANCTIONS** of a serious level in their legislation for non-declarations, late and false declarations or incomplete ones , in order to...
  - deter breaches on posting declarations
  - guarantee equal treatment (no free-sanctions zone)
  - settle the advantages of covering abuses by “double criminality”

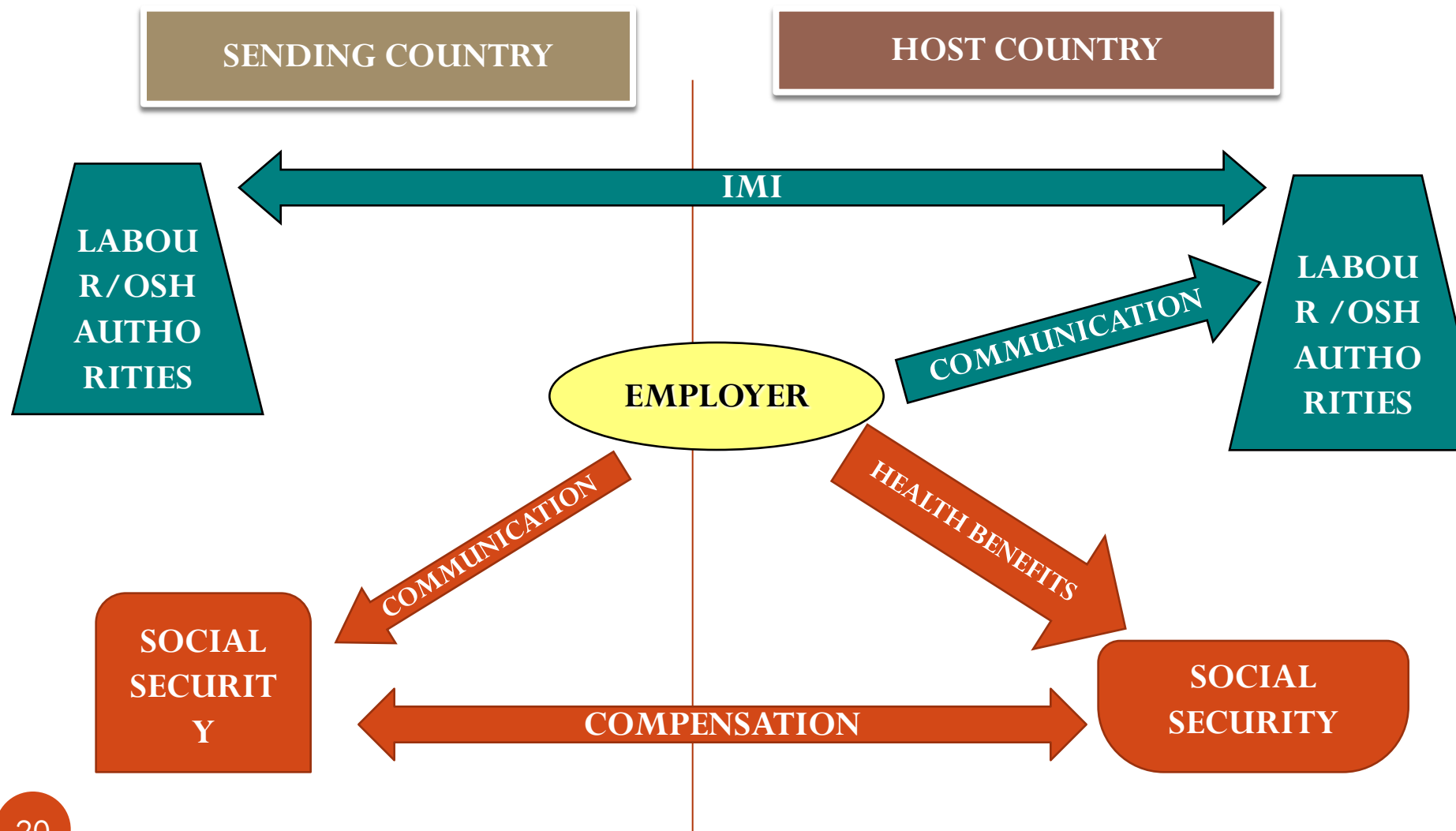
# THE COMMUNICATION OF WORK RELATED ACCIDENTS AND OCCUPATIONAL DISEASES

- In the framework of regulation 987/09 (art. 34), posting companies should make a **double notification**
  - To the competent Social Security institution of the **country of origin**
  - In most most also to the Labour authorities of the **host country** (in most cases)
    - ❑ The first notification to a Social Security institution is usually made in order to obtain benefits
    - ❑ the second has been established to investigate OSH and other working conditions corresponding to the nucleus of article 3 by Labour Inspectors. Actually the notification is rather seldom submitted to Labour authorities.
- **In order to avoid fraud, double bureaucracy and underreporting we propose that both notifications should follow up in a unique or at least coordinated procedure.**

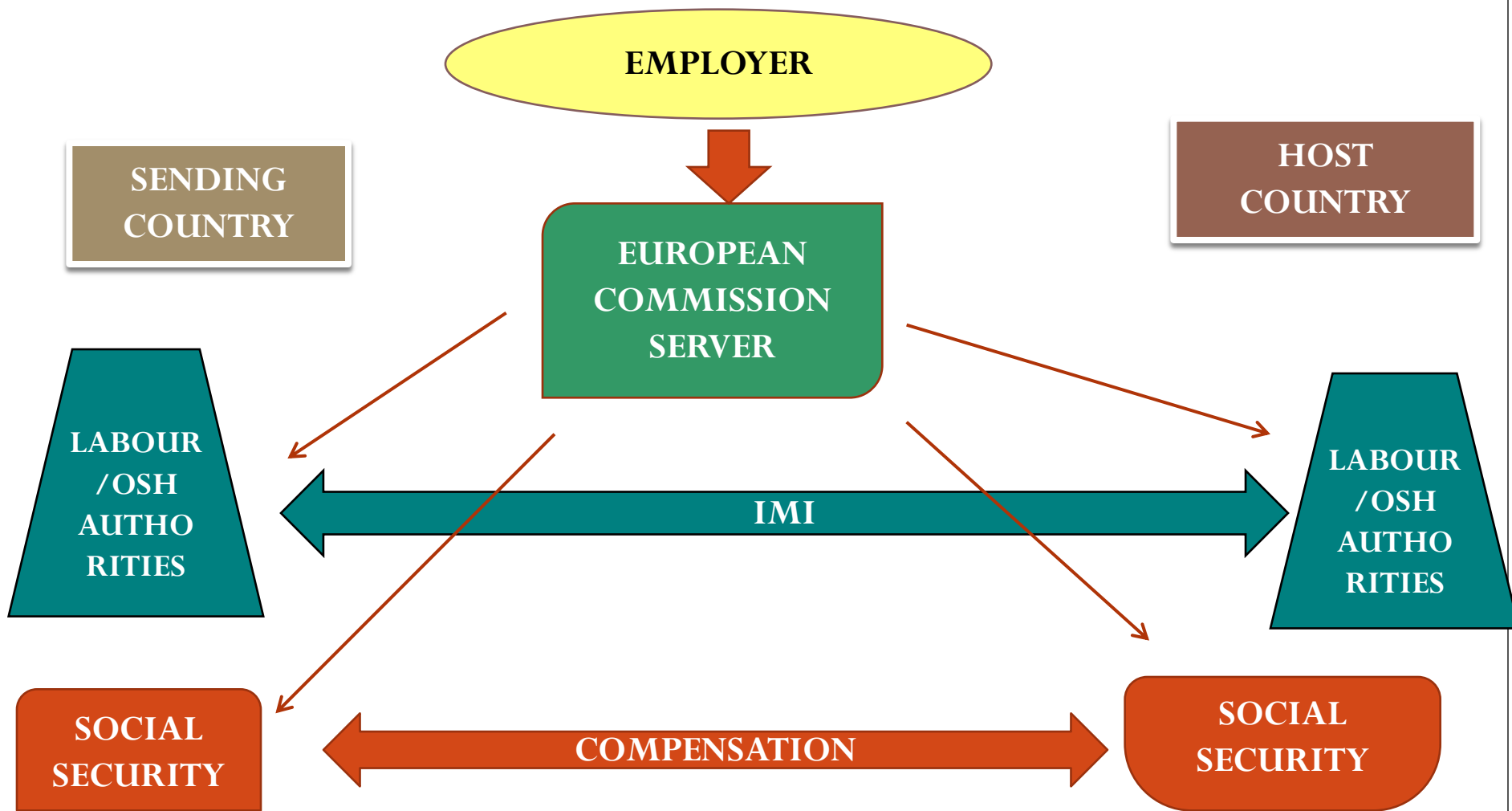
## Fourth Cibeles proposal

- **Notification** of work related accidents and occupational diseases related to posted workers
- **To whom?** To labour inspectorate of the Host MS and the Social Security body in the sending State
- **How?** Through a European information system/platform – ideally this could be via the same EU platform proposed for the prior posting declaration.

# Current communications on work-related accidents and diseases



# Cibeles proposal on communications on work-related accidents and diseases



# Fifth Cibeles proposal: a common instrument to identify posted workers

Other need for Labour Inspectors is to **identify workers in the workplace.**

The instruments we usually use are **national identity cards, passports and the form A 1**. In some Member States Labour Inspectors have detected fake A 1 forms or A1 provided with retro-active effect; sometimes there are no identifying documents at all + no verification of A1 authenticity is allowed!

## POSSIBLE SOLUTIONS:

1. **The European Health Insurance Card (EHIC)** has been established to provide access tot Social Security health benefits in the host MS.

We propose that this card could be used for other utilities such as the identification of posted workers before Labour inspectors

CONTRA: EHIC is currently used by a limited number of MS

PRO: EHIC is usually related to posting of workers and it does not entail an additional administrative burden for them.

# Fifth Cibeles proposal: a common instrument to identify posted workers

## POSSIBLE SOLUTIONS:./...

2. Other option would be to follow up the **STORK project** to establish a European **e-ID Interoperability** Platform that will allow citizens to establish new e-relations across borders, just by presenting their national eID.
3. A 3th option could be a “**Posting identification card**” with a personnel photo, delivered by the Authority of the sending state (E.g. the body who delivers the A1 form)
4. A 4th option (most helpful) would be a **mandatory list of presences** on the workplace with the names and social security numbers of the posted workers , to be kept and updated at the workplace by the employer (or his mandated person) during the period of posting activity.

## A mandatory ex ante posting declaration negotiable? **(OUR 1ST & 2nd proposal) - What says EU Commissioner Mr. László ANDOR**

(responsible for Employment, Social Affairs and Inclusion) at the Conference on Fundamental Social Rights and the Posting of Workers in the framework of the Single Market Brussels, 27 June 2011 ?

*“Well-functioning administrative cooperation between competent authorities of the Member States is essential in this respect. I would certainly welcome your views on possible improvements in this area, for instance as regards obligations on the respective competent authorities to cooperate and to mutually inform each other. **We could also discuss whether a more uniform, or possibly mandatory, system for notifications of posting could be helpful in this respect.**”*



## Other sources supporting the proposal of the introduction of a mandatory posting declaration in all EU member states

1. Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union to the European Commission - 21 March 2011 (Contract Number VT/2009/0541) by Aukje van Hoek & Mijke Houwerzijl

### **Notification requirements :**

**all stakeholders interviewed for this study seem convinced of the advantages of this instrument both for enforcement purposes and for policy purposes**

**Comparative study on the legal aspects of the posting of workers in the**  
**by Aukje van Hoek & Mijke Houwerzijl**

## **Recommendation 27**

**At national level , a closer focus is needed in the national authorities' monitoring and enforcement policy...In this respect, the question whether a requirement on service providers to simply notify the presence of posted workers may be justified and proportionate as a precondition for monitoring the rights of posted workers, merits further study. It may help the national actors to detect posting of workers situations and it gives insight into the size and occurrence of this phenomenon at sectoral level.**

Comparative study on the legal aspects of the posting of workers in the  
by Aukje van Hoek & Mijke Houwerzijl

## Recommendation 38

From an EU perspective, ..., the differences between Member States with and without notification systems may create confusion and uncertainty, as also may the different content of notification requirements in force.

Whether it would therefore be recommendable to coordinate a notification system at EU-level, by laying down at least the minimum and maximum requirements of such a system merits further study, notably with regard to the effectiveness and proportionality of such a tool, as well as its implications from an administrative burden point of view.

## Other sources supporting the proposal of the introduction of a mandatory posting declaration in all EU member states

2. Preparatory study for an Impact Assessment concerning the possible Revision of the legislative framework on the Posting of workers in the context of the Provision of services - 14.10.2011- by ISMERI Europa

- Posting is seemingly not affected by the monitoring tools . No stakeholder mentions the pre-notification system as an obstacle
- Public bodies but also social partners declare to significantly rely on the effectiveness of monitoring tools to improve the regulation of posting.
- LIMOSA (Belgium) has significantly improved the detection rate of abuse, thereby increasing effectiveness and limiting the costs of inspections
- The new on-line systems have a high potential for reducing costs and burdens and improve administrative cooperation (lower burdens and costs than 'business as usual').

# Other sources supporting the proposal of the introduction of a mandatory posting declaration in all EU member states

2. Preparatory study for an Impact Assessment concerning the possible Revision of the legislative framework on the Posting of workers in the context of the Provision of services - 14.10.2011- by ISMERI Europa

**Option 3. - A partial review of Directive 96/71 (articles 4–6) improving application, compliance and enforcement in practice**

.../...

- **An obligation for MS to join a common system of ex-ante declaration of posting**

## Other sources supporting the proposal of the introduction of a mandatory posting declaration in all EU member states

3. A Revision of the posting workers directive – 8 proposals for improvement – final report – 31 May 2010 – by ETUC (European Trade Union Confederation)

### **Proposal 8.3.:**

**The host Member state may require prior notification of posting, supplemented by the relevant information in respect of wages and employment conditions**

## Other sources supporting the proposal of the introduction of a mandatory posting declaration in all EU member states

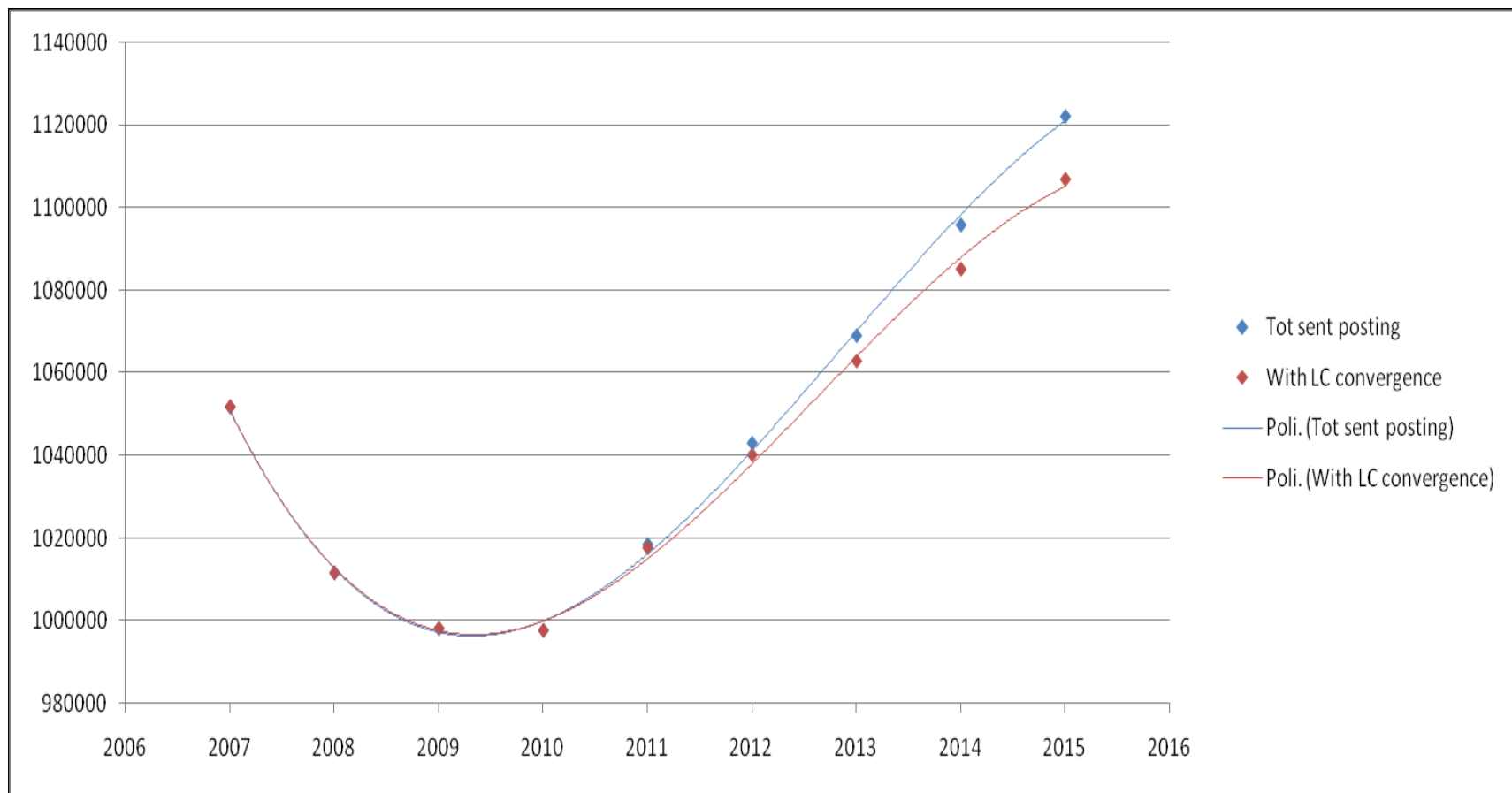
4. Effectiveness and enforcement of legislation : de lege lata and de lege ferenda – Prof; dr. Yves Jorens – Ghent university, Faculty of Law – Conference on fundamental social rights and posting of workers – Brussels 28 June 2011

**Effectiveness and enforcement of legislation: what to do?**

.../...

**- pre- notification system can be a very effective way of monitoring compliance and preventing social fraud**

# Previsions of posting impact - Impact Assessment - by ISMERI Europa - 14.10.2011



- Actually: 1 million posted workers each year temporary working in another MS
- Top 3 countries of destination: Germany, France & Belgium.



# REGULATION OF ALL TYPES OF MUTUAL ASSISTANCE FORMS FOR THE INVESTIGATION OF BREACHES

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Third conclusion

# CURRENT MUTUAL ASSISTANCE FORMS AND REGULATIONS

## APPLICABLE

- **Internal Market Information System (IMI)**
  - Regulated in Article 4 Directive 96/71. It has started in 2011
  - Replying to reasoned requests (Request for information)
- **KKS (Knowledge Sharing System)**
  - No regulation: designed for sharing information on OSH without using personal data
- **Bilateral Agreements**
  - Different legal nature of each Agreement: they can be treaties approved by Parliaments which are legally binding. Sometimes they are non legally binding declarations or even informal cooperation.
  - Their content varies considerably

## NOT ALWAYS APPLICABLE

- **Convention (2000) for Mutual Assistance on Criminal Matters**
  - It regulates all forms of mutual assistance
  - No real experience and it can not be used by LI in some countries: at least in BE, HU, IT, ES
- **National legislations can regulate Mutual Assistance:**
  - Belgium, Spain and Hungary
- **European Convention on the Service Abroad of Documents relating to Administrative Matters. Strasbourg, 24.XI.1977**
  - No real experience and can not be used by LI in some countries

# Sixth Cibeles proposal: Regulating all forms for exchanging information

- Request for information (Article 4 PWD)
  - The request for information and this regulation does not determine whether the receiver should provide only the information already available or it is also required to carry out the necessary investigation to get it and then transmit it to the applicant.
- Spontaneous information
  - It is usually related to offences and the infringements of rules of law whose punishment or handling of which falls within the competence of the authority of other Member State at the time the information is provided.
  - The spontaneous information could also be relating to alerts on labour inspection activities, especially on OSH matters.
- Technical cooperation
  - This is relating 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 matters.

# Seventh Cibeles proposal: regulating all forms of cooperation

- Hearing of witnesses
  - It 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 it is necessary to rebuild the facts occurred with occasion of a work-related accident.
- Joint teams
  - The Directive should provide the right for Authorities competent for posting directive, to participate to simultaneous trans-border actions on a mutual basis, to assist to hearings, or setting up joint teams.
- Support in procedures
  - For the support in the notification of administrative acts and the support in judicial procedures and the execution of fines.

# Eight Cibeles proposal: a European Network for inspection experts on OSH

- It is necessary a **network of experts in the Inspectorates on Occupational Safety and Health (that it could be called EUROSH)** in order to promote a **proactive strategy**:
  - Facilitate the technical assistance to Labour Inspectors by
    - Exchange of inspection tools (risk assessment, checklists)
    - Exchange of information of outcomes on inspection in specific branches and enterprises (i.e. in high risk branches and cross border operating enterprises)
    - Exchange of information on administrative proceedings
    - Organising training and information actions at European level (i.e. campaigns, training and inspection tools for new risks within European OSH-Strategy)

# THE NEED TO ENSURE CROSS-BORDER EXECUTION FOR FINANCIAL PENALTIES OF ANY KIND

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Fourth conclusion

# INFRINGEMENT PROCEDURES OF LABOUR INSPECTORATES

	BE	MT	HU	FR	AT	DE	IT	PT	ES
Penal Sanction	X (30%)	x		x			X		
Administrative Sanction	X (70%) They can be appealed to Labour Courts	X Can be appealed to Civil Court	X They can be appealed to Labour Courts	X (in a few cases)	X They can be appealed to Courts for Adm. Affaires	X They can be appealed to Penal Courts	X They can be appealed to Penal or Adm. /Civil Court	X They can be appealed to Labour Court	X They can be appealed to Courts for Adm. Affaires

# LEGAL ROLE OF LABOUR INSPECTORS

	BE	MT	HU	FR	AT	DE	IT	PT	ES
Prosecution of criminal offences	x	x		x			X		
Prosecution of administrative infringements	x	x	x	x	x	x	X	X	X



# Article 87 TFEU

- 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 for in the 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.**

# Current legal instruments for cross-border execution of fines

- FRAMEWORK DECISION 2005/214/JHA
  - At least four MS consider it not applicable to administrative fines which can not be appealed to criminal courts
- DIRECTIVE 2010/24/EC
  - The scope of this Directive could be dubious since the term “duty” could only be referred to **pecuniary obligations relating to public incomes** without involving penalties relating to other non pecuniary public duties such as those on occupational health and safety.
- **FOURTH CONCLUSION: WE DO NOT HAVE YET A LEGAL INSTRUMENT WHICH REGULATES FINANCIAL PENALTIES PROPOSED OR IMPOSED BY ALL THE EUROPEAN LABOUR INSPECTORATES**

# Twelfth Cibeles proposal: A NEW REGULATION ON EXECUTION OF FINES IN LABOUR INSPECTION MATTERS

- **Regulating in a legal instrument the mutual recognition and execution of all the financial fines**
  - Be it of criminal or administrative nature,
  - No matter what kind of tribunals or courts are competent for an appeal against administrative fines.

# Thirteenth Cibeles proposal: A EUROPEAN REGULATION TO EXECUTE ADMINISTRATIVE FINES ON OSH AND/OR POSTING MATTERS

- Another solution could be to approve a new instrument for the cross-border execution of administrative fines which can be appealed to other courts than penal
  - In the domain of posting (the scope of Article 3 of the Directive 96/71/EU)
  - Or at least of occupational safety and health pursuant to Article 153 TFEU.

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## Fourteenth Cibeles proposal: HARMONIZATION OF INFRINGEMENTS ON OSH AND/OR POSTING

- Because double criminality is a usual precondition for mutual assistance and mutual recognition in the execution of financial fines.
- It would be necessary a previous comparative study about infringements in MS