

PROJECT CIBELES REPORT

CONVERGENCE OF INSPECTORATES
BUILDING A EUROPEAN LEVEL
ENFORCEMENT SYSTEM

A Project for setting up EUROSH
(A European Network for Enforcement)

its

CIBELES

Project



With Support from the European Union

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P r o j e c t



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

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

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CIBELES

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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.

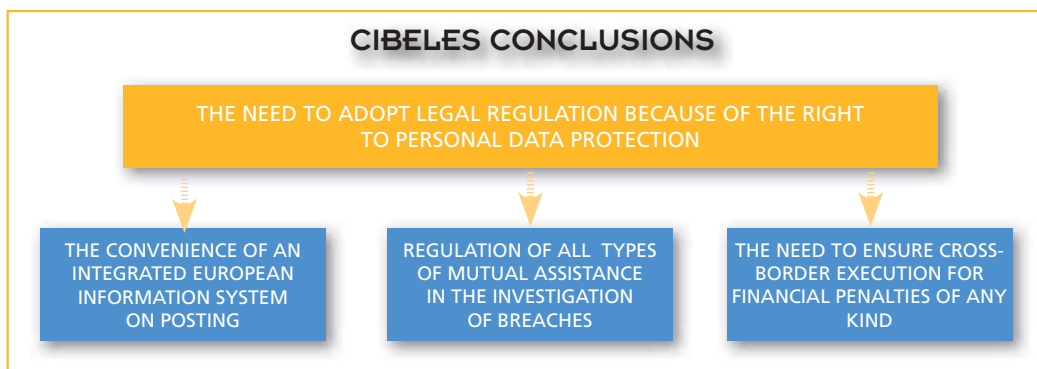
Posting can involve a certain deterioration of working conditions where it combines with fewer resources available for workers, greater risk of fatigue due to frequent travel, lack of training provided in the host country, absence of mandatory protective equipment, sub-standard housing and dangerous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

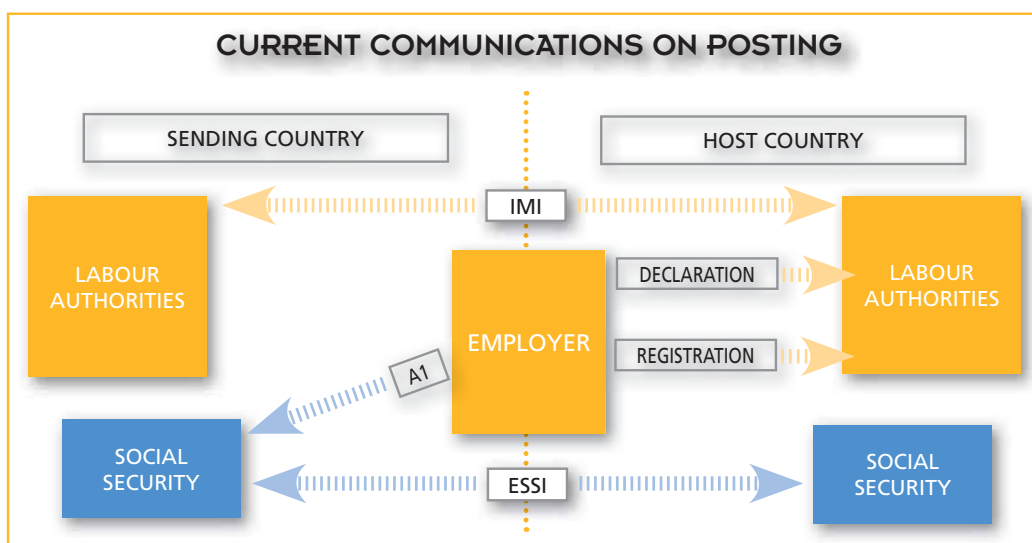
2.6 AN INTEGRATED INFORMATION SYSTEM ON POSTING TO FACILITATE THE DESIGN OF INSPECTION ACTIONS

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.



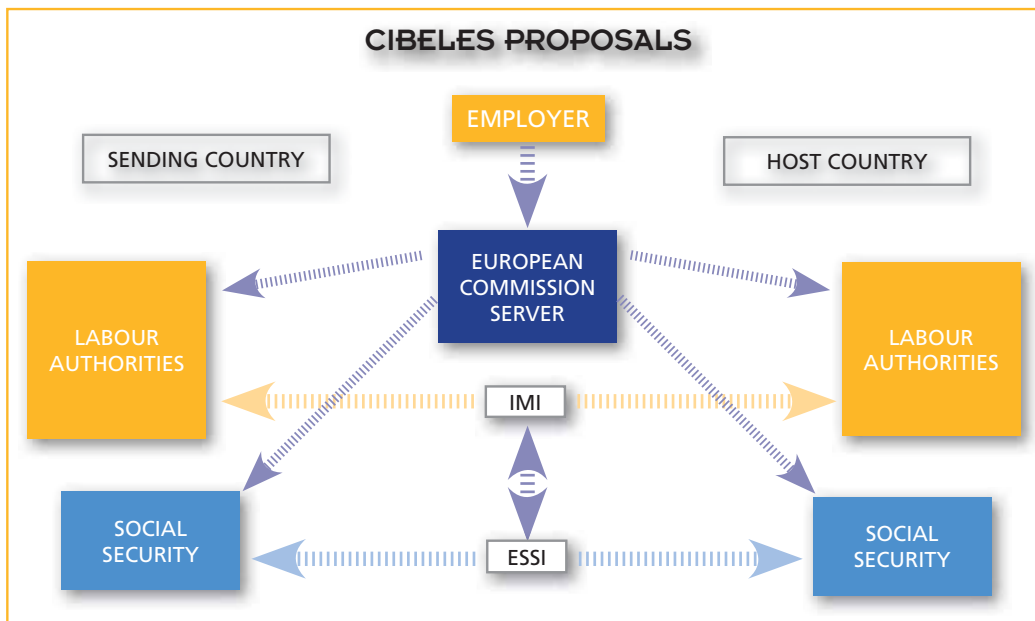
On the other hand, new legal provisions of the Member States, by virtue of which the inspectors are authorised to request companies supply additional information about posting, produce documents and so on, may clash with the basic right of free movement of service providers as the ECJ has already ruled.

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.



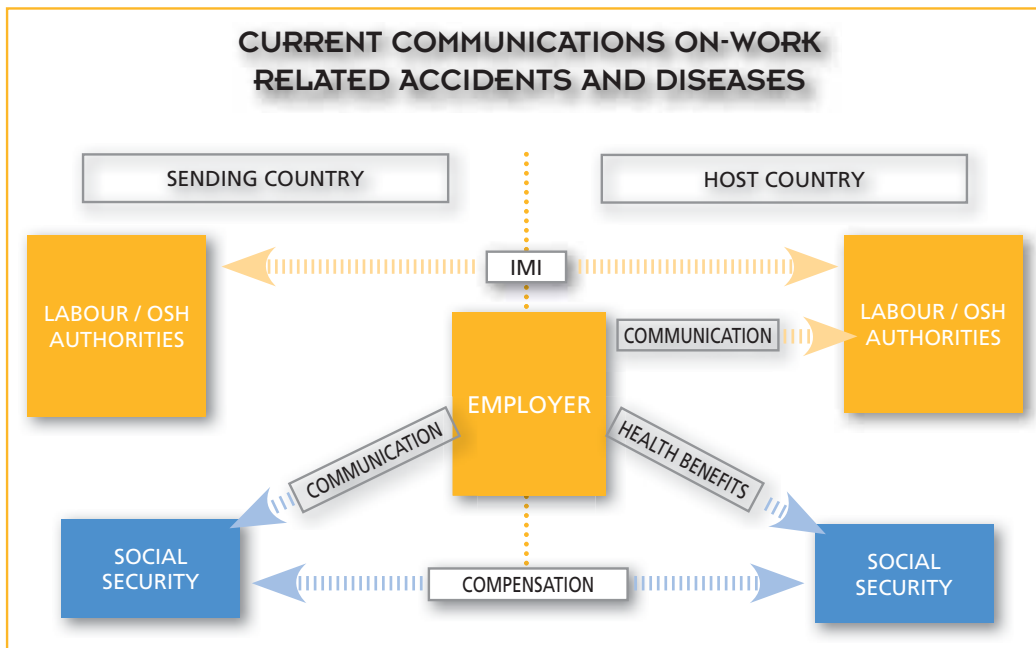
The second proposal takes this further and would entail introducing a **measure to harmonize legislation on communication of posting Europe-wide** (Article 114 or 197 TFUE) and unify the obligations to be fulfilled by posted companies as well as ensuring the supervision tasks of Labour Inspectors. The 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.**

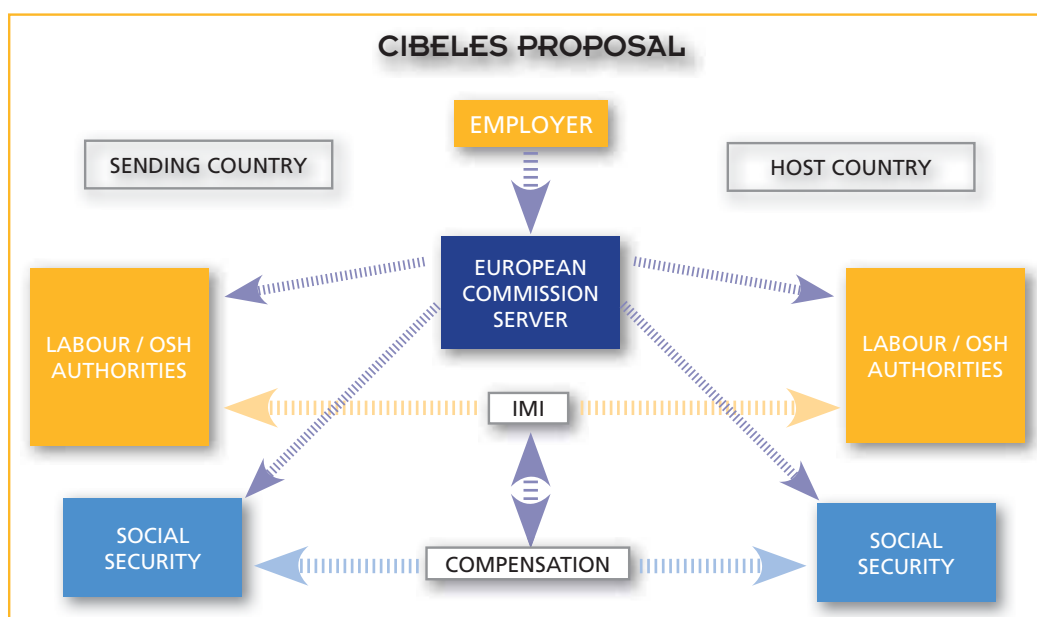
2.6.2 The communications on work related accidents and professional diseases of posted workers

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).

2 The CIBELES Project

1. CIBELES PROJECT AIMS

C.I.B.E.L.E.S. means “Convergence of Inspectorates Building a European Level Enforcement System”.

CIBELES project has been approved and financed by the European Commission in the frame of the European Senior Labour Inspectors Committee (SLIC) activities.

The SLIC Members which have participated in the Project are the Labour Inspectorates of **Belgium, Malta, Hungary, France, Austria, Germany, Italy, Portugal and Spain.**

CIBELES project has the following aims:

- a) Enhancement of the exchange of information system between Labour Inspectorates in order to attain cross border enforcement and mutual assistance as regards inspection and sanctioning proceedings.
- b) Making proposals to the SLIC and the Commission toward further initiatives, programmes and regulations about these issues.

2. THE SLIC AND THE AIMS OF THE PROJECT

SLIC was informally established in 1982 to assist the Commission on OSH matters and it was formally regulated by the Commission Decision 95/319/EC.

It is composed of representatives of the Labour Inspections services of the Member States and due to the diversity of responsibilities of the Labour Inspectorates it can also provide its opinion on other matters relating to social legislation.

CIBELES Project activities are within the SLIC objectives stated in Article 3 of the Decision 96/319/EC and particularly in “developing exchanges between national labour inspection services of their experiences in monitoring the enforcement” and “developing a reliable and efficient system of rapid information exchange between labour inspectorates on all problems encountered in monitoring the enforcement of Community legislation in the field of health and safety at work”.

The aim of CIBELES Project is not to evaluate the efficiency of Labour Inspectorates that take part in the project but to describe the problems and obstacles which can hamper mutual assistance between different Inspectorates in their enforcement tasks and particularly in the cross-border enforcement.

3. CIBELES PROJECT ACTIVITIES

1) KICK-OFF MEETING (Madrid, April 29th, 2010)

Host country participants:

- Raimundo Aragón: General Director of the Labour and Social Security Inspectorate
- Luisa Carrillo: General Direction of the Labour and Social Security Inspectorate
- Esther García: General Direction of the Labour and Social Security Inspectorate

CIBELES Team Experts:

- Andrea Di Cosola (IT)
- Arsenio Fernández (ES)
- Fernando Villalobos (ES)
- Jessy Pretto (FR)
- Manuel Velázquez (ES)
- María Alonso (ES)
- Mark Gauci (MT)
- Pablo Páramo (ES)
- Philippe Vanden Broeck (BE)
- Rainer Hellbach (DE)
- Szabolcs Karaszek (HU)
- Vitor Bernardo (PT)

In this meeting, the first model of questionnaire for technical visits and the calendar of activities were approved.

2) Meeting with DG Employment and DG Justice (Brussels, September 22th, 2010)

European Commission experts:

DG Employment

DG Justice

CIBELES Team experts:

Pablo Páramo (ES)

Arsenio Fernández (ES)

3) Technical Visit to Belgium (Brussels, September 23rd and 24th, 2010)

Host country participants:

CIBELES Expert: Philippe Vanden Broeck

TWW (Safety & health inspection): Mr. Tousseyn Paul, Van Damme Karel, Imbrechts Willy, Myslinski Denis (KSS)

TSW (Social labour inspection): Mr. Vanden broeck Philippe – Mr Willems Hilaire

DAG (Administrative Fines): Mr. Van Damme Jackie (Beliën Marc –Clauwaert Hans)

International affairs: Mr. Vandamme François

Ministry of Justice: (Service de Droit pénal européen) : Mrs. Descamps, Marie-Hélène and Mrs. Cloosen, Nathalie

Public prosecutor: Mr. Meirsschaut Dany, Labour Prosecutor Gent, President of the council of Labour prosecutors

SIOD (Social Fraud Information and Investigation Service): Mrs. ROMAIN Nathalie

CIBELES Team experts:

Arsenio Fernández
Fernando Villalobos
Manuel Velázquez
Pablo Páramo
Rainer Hellbach

The results of this technical visit are in the report on Belgium (Chapter 4, Section 1).

4) Technical Visit to Malta (Valetta, 14th and 15th, 2010)

Host country participants:

CIBELES Expert: Mark Gauci

CIBELES Team experts:

Arsenio Fernández
Jessy Pretto
Szabolcs Karaszek

The results of this technical visit are in the report on Malta (Chapter 4, Section 2).

5) Conference of experts (Palma de Mallorca, October 13th, 2010)

Speakers invited:

- Mrs Moitinho (Deputy Head of Unit for Health, Safety and Hygiene at Work-DG Employment, Social Affairs and Equal opportunities of the European Commission). *“EU initiatives to foster effective and equivalent enforcement of EU acquis on health and safety at work in all Member States”*.
- Ms. Belén Plaza (State Lawyer, Agent before the EU Court of Justice, Spanish Ministry of Foreign Affairs and Cooperation): *“Penalties in the EU. Common principles set by the ECJ and practical reflections on enforcement”*.
- Ms María Luz Vega (Senior Labour Administration Specialist, **LAB/ADMIN-ILO**) *“ILO’s view of enforcement of legislation of transnational work, especially concerning occupational health and safety”*.
- Dr Fabienne Muller (University of Strasbourg) *“The effectiveness of regulations and controls regarding posting of workers in the framework of the provision of services”*.
- Dr Ybarra Bores (Professor of University Pablo de Olavide-Seville) and Dr Pérez Gil (Professor University of Burgos): *“Cross border enforcement of OSH sanctions: outline and explanation of the problem. Possible solutions”*.
- Mr Rafael López Parada (Magistrate of the Superior Court of Castilla y León) *“Concerns about protection of personal data”*.
- Mr. Justin Byrne (Visiting Scholar, Centre for Advanced Studies in the Social Sciences (CEACS), Juan March Institute/ European Institute for Construction Labour Research (CLR) : *“Posting in practice: experiences and perspectives from the construction industry”*.

CIBELES Team experts:

Andrea Di Cosola
Arsenio Fernández
Fernando Villalobos
Jessy Pretto
Manuel Velázquez
María Alonso
Mark Gauci
Martina Haeckel-Bucher
Philippe Vanden Broeck
Rainer Hellbach
Szabolcs Karaszek
Vitor Bernardo

Other participants:

Raimundo Aragón – General Director of the Spanish Labour Inspectorate
Luisa Carrillo – Spanish Labour Inspectorate
Juan Pablo Parra – Spanish Labour Inspectorate
Gonzalo Giménez – Spanish Labour Inspectorate
The papers of this conference have been included in the Chapter 3.

6) Technical Visit to Hungary (Budapest, Nov. 29th-30th 2010)

Host country participants:

CIBELES expert: Szabolcs Karaszek
Dr. Bartfai Zsolt, Deputy Head of Department Privacy Secure Office which depends on the Ombudsman Office in the Parliament

CIBELES Team experts:

Andrea Di Cosola
Jessy Pretto
Manuel Velázquez
María Alonso

The results of this technical visit are in the report on Hungary (Chapter 4, Section 3).

7) Interim Report Visit to the European Commission (Luxembourg, January 19th, 2011)

Juan Pablo Parra
Manuel Velázquez

8) Technical Visit to France (Paris, January 25th and 26th, 2011)

Host country participants:

CIBELES expert: Jessy Pretto

Jean Bessiere: Deputy Director of the General Direction of Labour (DGT)

Claire Seiller and Pascal Baranski: Department on labour and enforcement policies (DGT)

Anne Sipp, Julie Beaussier and Chantal Brillet: office on individual labour relationships (DGT)

Salvatrice Mollet, Labour Inspector, Liaison Office of Nord-Pas-de-Calais

Jean-Paul Giacobbi, Division of community and international affairs, Direction of Social Security

Laurent Vilbouf: Department of support to enforcement (DGT)

Solène Faou: Magistrat, Office of public health, social law and environment, Direction on criminal affairs, Ministry of Justice and Freedoms

CIBELES Team experts:

Fernando Villalobos

Gabriela Beltrán

Philippe Vanden Broeck

Rainer Hellbach

The results of this technical visit are in the report on France (Chapter 4, Section 4).

9) Technical Visit to Austria (Vienna, February 16th and 17th, 2011)

Host country participants:

CIBELES expert: Martina Häckel Bucher

Federal Ministry of Labour, Social Affairs and Consumer Protection

Central Labour Inspectorate Labour Law

Federal Ministry of Finance, Unit to combat illegal work practices, called KIAB (Kontrolle illegaler Arbeitnehmerbeschäftigung)

CIBELES Team experts:

Manuel Velázquez

María Alonso

Vitor Bernardo

The results of this technical visit are in the report on Austria (Chapter 4, Section 5).

10) Technical Visit to Germany (Berlin, March 8th and 9th, 2011)

Host country participants:

CIBELES Expert: Rainer Hellbach

Federal Ministry of Labour and Social Affairs: Michael Koll, Kai Schäfer, Astrid Schneider-Sievers

Federal Office of Justice: Dr. Stefanie Plötzgen-Kamradt and Gerda Besedina

Federal Ministry of Finance: Philipp von Preuschen
State Office for Occupational Health and Safety, Brandenburg: Dr. Detlev Mohr
Institution for Statutory Accident Insurance and Prevention in the Building Trade,
Berlin: Frank Werner

CIBELES Team experts:

Gabriela Beltrán
Manuel Velázquez
Martina Haeckel-Bucher
Philippe Vanden Broeck

The results of this technical visit are in the report on Germany (Chapter 4, Section 6).

11) Technical Visit to Italy (Rome, April 12th and 13th, 2011)

Host country participants:

CIBELES Expert: Andrea di Cosola
Mr. Paolo Pennesi (Director General of Labour Inspection)
Ms. Francesca Amicucci Ministry of Justice – DG Penal Justice – Legislative and
International Dept. Cooperation Office
Ms. Alessandra Pierucci Italian Data Protection Authority
Ms. Sonia Colantonio Ministry of Labour and Social Policies – DG Labour Inspection
Ms. Antonella Milieni Ministry of Labour and Social Policies – DG Labour Inspection
Ms. Anna Cetrangolo Ministry of Labour and Social Policies – DG Labour Inspection

CIBELES Team experts:

Manuel Velázquez
María Alonso
Mark Gauci
Vitor Bernardo

The results of this technical visit are in the report on Italy (Chapter 4, Section 7).

12) Technical Visit to Portugal (Lisbon, 26th and 27th, 2011)

Host country participants:

CIBELES expert: Vitor Bernardo
Mr. José Luis Forte – Work Conditions Authority
Mr. Luís Rodrigues - Work Conditions Authority
Mrs. Teresa Pargana - Work Conditions Authority
Ms. Torres Pereira - Work Conditions Authority
Mr. Nuno Carneiro - Portuguese Tax System
Mr. José Albino Alves Costa - Public Prosecutor Office

CIBELES Team experts:

Andrea Di Cosola
Fernando Villalobos
Gabriela Beltrán
Silvio Farrugia

The results of this technical visit are in the report on Portugal (Chapter 4, Section 8).

13) Technical Visit to Spain (Madrid, 12th and 13th, 2011)

Host country participants:

CIBELES Experts: Manuel Velázquez, Gabriela Beltrán, María Alonso
General Direction of the Labour and Social Security Inspectorate: Demetrio de Vicente (General Director), Juan Pablo Parra and Esther García
General Direction of Labour: Rafael García Matos
General Treasury of Social Security: Carmen Benito Romero
Raquel Romero - Directorate General for EU Justice and International Organizations
Ana Cristina Sanz – Public Prosecutor, Public Prosecutor Office in Madrid
Diego Chacón - State Tax Administration Agency – Responsible of the Liaison Office on Mutual Assistance for Recovery

CIBELES Team experts:

Katalin Balogh
Martina Haeckel-Bücher

The results of this technical visit are in the report on Spain (Chapter 4, Section 9).

14) Meeting of the CIBELES Team experts (Palma de Mallorca, June 8th and 9th, 2011)

CIBELES Team experts:

Andrea Di Cosola
Gabriela Beltrán
Jessy Pretto
Katalin Balogh
Manuel Velázquez
Maria Alonso
Martina Haeckel-Bücher
Monica Meinecke
Philippe Vanden Broeck
Rainer Hellbach
Vitor Bernardo

European Commission

Florian Schierle

The results of this meeting are in the report on Palma de Mallorca (Annex III).

15) Survey on Cross-border enforcement in Spain

The results of this survey are in the report on Palma de Mallorca (Annex I).

16) Meetings and interviews with experts of the European Commission (Brussels, September 29th, 2011)

European Commission Experts:

Florian Schierle (DG Employment B2)
Arsenio Fernández (DG Employment B2)
Iva Zamarian (DG Justice B1)
Cecile Helmryd (DG Internal Market E1)
Radek Casta (DG Employment B4)

CIBELES Team experts:

Manuel Velázquez
Philippe Vanden Broek
Jessy Pretto
Martina Häckel Bucher

17) Final Conference (Madrid, November 10th and 11th, 2011)

3 CIBELES Technical Visits Reports

1. REPORT ON BELGIUM

SECTION 1. INFORMATION AND STATISTICS ON POSTING OF WORKERS AND PROVISION OF SERVICES IN BELGIUM

According to Belgian legislation companies coming from other Member States within a provision of services need to register with the KBO-BCE crossroad bank of undertakings only if: a) they set up a local subsidiary; b) for legal persons (under foreign law statute) that must register for one or another activity or aspect regarded by the Belgian law as mandatory (e.g. when the provider needs a license).

All Labour Inspectors have access to KBO-BCE database. The webpage <http://www.limoso.be> contains information addressed to foreign companies, organizations or self-employed persons which wish to employ someone in Belgium, or, if self-employed workers, wish to work temporarily or partially in Belgium.

The applicable regulatory framework

Directive 96/71/EC (PWD) was transposed by the Act of 5 March 2002. Implementation was delayed by the Court of Justice decision in the *Arblade* case (November 1999). A 'posted worker' as (in an atypical way) defined by the Act is "a worker who carries out work in Belgium and who either habitually works in the territory of one or more countries other than Belgium or who was recruited in a country other than Belgium".

The employment relationship between the foreign posting undertaking and the gainfully employed posted worker should already exist prior to the temporary posting and should be retained throughout the period of posting. Article 5 of the Act implements the working, remuneration and employment conditions. Application is not restricted to the nucleus of terms and conditions of employment enumerated in the Posting Directive but encompasses nearly all legal provisions dealing with remuneration and employment conditions, included all collective agreements which are generally applicable and have general binding force. In Belgium this is the case for almost all economic branches! In theory there are practically no differences between the rights of posted workers and those of Belgian workers. In practice, however, Labour inspectors only enforce the hard nucleus of provisions according to article 3 of the PWD.

Facts and figures related to posting

The European Commission states that the most reliable and up-to-date statistical data presently available are based on the number of the A1 (former E101) certificates delivered by the social security institutions. Since 1 May 2010 Regulation 883/2004 is applicable and the A1 certificate replaces the E101 certificate. At this moment the authorities have updated the on-line application and A1 declarations are issued. In Belgium, the A 1

certificates of the posted workers are since a long time integrated in a database, called GOTOT-IN (Cross-border Occupation). The number of A1 certificates in the GOTOT-IN database does not correspond to the total number of posted workers. The National Social Security Office only receives the A1 certificates issued by neighbouring Member States + Poland. Many EU Member States do not transfer a copy of the A1 certificate to the receiving country.

The A1 certificates with Belgium as sending country are collected in the GOTOT-OUT database. According to 2009 figures, Belgian companies posted 50 774 workers to other EU Member States. These figures are reliable.

For more reliable data about incoming workers: see below (Limosa).

Registration and notification issues

There is a range of databases of interest to the social inspectorate services: DIMONA, DMFA, GENESIS, OASIS, DUC, LIMOSA and GOTOT-IN. E-Government plays a very important role in the registration and notification procedures and is used for data sharing, data matching and data mining.

Previous to commencement of work in Belgian territory, non-Belgian employers or self-employed persons that carry out temporary or partial assignments in Belgium must declare their activities before the work starts.

The registration of posted workers has to be done by a compulsory LIMOSA declaration. LIMOSA (on-line declaration via the portal of the social security agency) was set up to prepare the opening of the labour market on 1 May 2009 for workers coming from new EU Member States. The declaration is an instrument of control in the fight against fraud and unfair competition by foreign workers who accept work at below-market wages and disregard Belgian labour standards.

LIMOSA makes it possible to deliver more detailed and accurate figures about posted workers. Employers of posted workers have to indicate how long the activity will probably last. If it lasts longer than the indicated period a new declaration is necessary. The declaration is obligatory for all incoming employees, self-employed persons, and (self-employed) apprentices, temporarily or partially who, in principle, are not subject to Belgian social security.

For posted employees, the identification data of the employee, the employer and the Belgian client or principal, but also the starting and termination dates, the type of service or the economic sector, the place where the activities will be performed, the weekly working hours and the time schedule of the employee have to be declared in the LIMOSA system. In certain circumstances exemption from the mandatory declaration is possible. The foreign employer who has made a LIMOSA declaration is exempted for a period of 12 months from the obligation to draw up certain social documents (work regulations, personnel register, and control prescriptions for part-time employees).

The applicant will receive a LIMOSA-1 certificate (L1 document) that certifies the mandatory declaration. The posted worker must keep the L1 document during his stay. The client will ask for the document before a foreign worker starts working. When the document cannot be presented, a client has to inform the authorities.

Non-respect of the LIMOSA declaration can lead to an administrative or penal sanction. Not respecting the mandatory declaration by the employer of a posted worker and not respecting the declaration by a posted self-employed person may eventually lead to a

penal sanction of between 500 and 2500 euro, multiplied by a surcharge of 5.5. The fine is multiplied by the number of employees for which the violation is committed, without being higher than 125,000 euro.

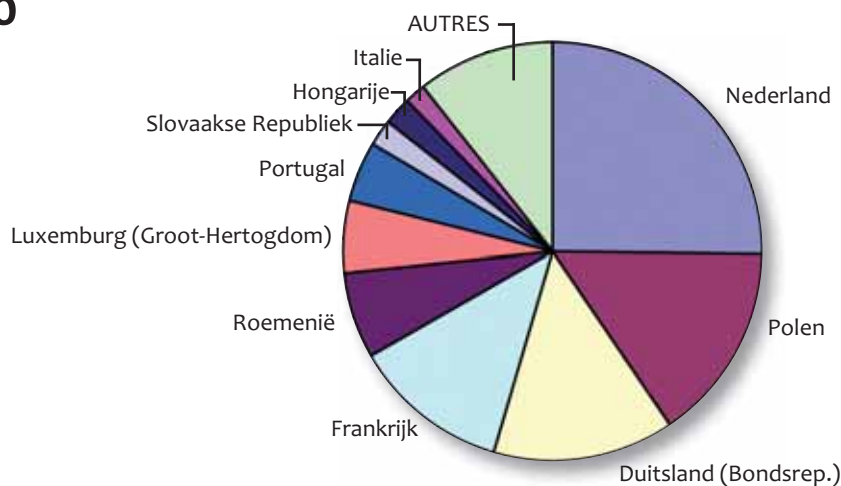
Mitigating circumstances can be applied without being lower than 40 percent of the minimum fine. There is even a prison term from 8 days up to one year. The administrative sanction is fixed at between 1,875 and 6,250 euro. The fine is multiplied by the number of employees involved, without being higher than 100,000 euro. Mitigating circumstances can be applied without being lower than 40% of the minimum fine. Not only the employer but also the client can receive a penal or administrative sanction. This sanction is lower than that for the employer.

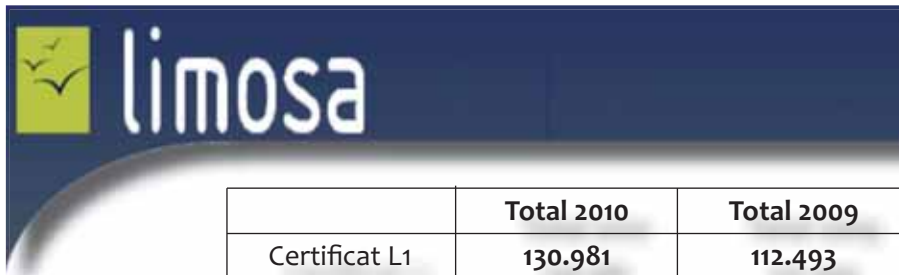
The mandatory LIMOSA declaration is an effective tool for risk analysis and for the goal-oriented mobilisation of the social inspectors. By matching the LIMOSA declarations and A1 certificates in the GOTOT-IN database it is easier to find violations of the posting rules. By verifying social and labour documents, inspection services have the possibility to check whether an employer respects remuneration and working conditions.

The databases DIMONA and DMFA are also important verification tools for national workers. DIMONA (Immediate Declaration) is a tool to declare a national worker at the moment he starts and stops working. DMFA (Multifunctional Declaration) is a tool for declaring the wages and working time of the employees on a three-monthly basis. Posted workers are not subject of those Dimona and DMFA databases. GENESIS (Gathering Evidence from National Enquiries for Social Inspection Services) serves as a 'portal' to different databases useful to the social inspectors for their preparation, execution or finalisation of an inspection on site.

One of the databases within GENESIS is the 'register of investigations' that collects all the ongoing and closed investigations (e.g. posted workers) of four federal social inspection services. OASIS (Anti-fraud Organisation of the social inspection services) is a fraud detection system that tries to find potential fraudulent companies on the basis of predetermined warning signs for three specific sectors (construction, transport and cleaning). The reporting of work in progress in the real estate sector at workplaces via a database called DUC is a tool for determining the type and scale of the work and the identity of the contractor and subcontractors. The contractor is relieved from the obligation to make a declaration when he does not use a subcontractor or when the total amount of the activities is lower than 25,000 euro (ex. VAT).

2010





	Total 2010	Total 2009
Certificat L1	130.981	112.493
No Certificat L1	559	918
Total	131.540	113.411
WORKER	229.251	194.550
Self employed	30.436	21.575
trainee	799	859
Independant trainee	109	131
Total	260.595	217.115
Top 5	Netherland	Netherland
	Poland	Germany
	Germany	Poland
	France	France
	Roemenia	Luxemburg
Declaration online	263.350	217.071
Declaration by fax	0	167
Declaration byPost	49	4
Total	263.399	217.242

Most LIMOSA declarations were made for persons coming from neighbouring countries (60.7%)

2007	158.226
2008	224.905
2009	217.115

The numbers in the GOTOT-IN database and in the LIMOSA database differ considerably. The LIMOSA declaration is compulsory and an E101 certificate is not an essential condition for the legal posting of workers. Often, inspectors find in their enquiries that the data covered by A1 are often too theoretical, too limited and sometimes not corresponding to reality. Access and search in the integrated Genesis database (which allows a crosscheck between Limosa and GOTOT-IN data confirms these findings.












LIMOSA is just one of the on-line tools for Social Labour inspectors – OSH inspectors do not have access to them (yet), but could have in the future.













On the portal of the social Security Crossroad bank , social LI's have access to a number of official and protected databases/

Inspections sociales

Services en ligne

.be

<p>Calendrier technique</p>  <p>Plus d'info</p> <p>Consultation nouvelle fenêtre</p>	<p>DmfAPPL</p>  <p>Plus d'info</p> <p>Introduction nouvelle fenêtre, Modification nouvelle fenêtre</p> <p>DmfAPPL Monitoring</p>
<p>Genesis</p>  <p>Plus d'info</p> <p>Consultation nouvelle fenêtre</p> <p>Registre National</p>  <p>Plus d'info</p> <p>Consultation nouvelle fenêtre</p> <p>beConnected / eWorkspace</p> <p>Accessible pour tous les agents</p> <p>Espace de travail destiné à la collaboration entre les professionnels du secteur social</p> <p>Plus d'info</p> <p>Accéder à beConnected </p> <p>Accéder à leWorkspace </p> <p>Chômage temporaire</p>  <p>Plus d'info</p> <p>Introduction nouvelle fenêtre</p>	 <p>Consultation nouvelle fenêtre</p> <p>DRS (Déclaration des risques sociaux)</p>  <p>Plus d'info</p> <p>Introduction nouvelle fenêtre, Compléter nouvelle fenêtre, Annulation nouvelle fenêtre</p> <p>Ecaro</p>  <p>Plus d'info</p> <p>Consultation nouvelle fenêtre</p> <p>Eidorado</p>  <p>Consultation nouvelle fenêtre</p> <p>Iris - Consultation des loggings de sécurité</p> <p>Accessible à tous les conseillers en sécurité</p> <p>Cette application est destinée aux conseillers en sécurité des ISS. L'accès est uniquement possible via eID.</p> <p>Plus d'info</p> <p>Consultation nouvelle fenêtre</p>

<p>DB de suivi</p>  <p>Consultation_nouvelle fenêtre</p> <p>Déclaration unique de chantier</p>  <p>Plus d'info</p> <p>Consultation_nouvelle fenêtre</p> <p>Demande de rapports FAT</p>  <p>Demande_nouvelle fenêtre</p> <p>Demeco</p>  <p>Consultation_nouvelle fenêtre</p>	<p>Liste des codes</p> <p>Accessible pour tous les agents</p> <p>Consulter la liste des codes de la sécurité sociale</p> <p>Plus d'info</p> <p>Consultation </p> <p>Limosa - Déclaration obligatoire</p>  <p>Plus d'info</p> <p>Question_nouvelle fenêtre</p> <p>Mesures pour l'emploi</p> <p>Accessible pour tous les agents</p> <p>Vérifier cas par cas s'il existe des avantages ou des primes en faveur de l'emploi</p>
 <p>Consultation_nouvelle fenêtre</p> <p>Dimona et le fichier du personnel</p>  <p>Plus d'info</p> <p>Introduction_Dimona_nouvelle fenêtre, Fichier du personnel - déclarer et gérer_nouvelle fenêtre</p> <p>DmfA</p>  <p>Plus d'info</p> <p>Introduction_nouvelle fenêtre, Modification_nouvelle fenêtre, Versions_démo</p> <p>DmfA Monitoring</p>  <p>Consultation_nouvelle fenêtre</p>	<p>Plus d'info</p> <p>Procès verbal électronique (ePV)</p>  <p>Plus d'info</p> <p>Introduction_nouvelle fenêtre</p> <p>Répertoire des employeurs</p>  <p>Plus d'info</p> <p>Consultation_nouvelle fenêtre, Consultation_sécurisée_nouvelle fenêtre, Recherche alphabétique_nouvelle fenêtre</p>

Communications of work-related accidents and occupational diseases of posted workers

In case of a fatal work-related accident or an accident with serious permanent injuries, the employer must declare the accident to the Labour Inspection (Act of 4 August 1996 on well-being of workers in the performance of their work).

In case of a major accident in Seveso undertakings, the employer must communicate the occurring of the accident immediately to the emergency Government Coordination and Crisis Centre, who informs all relevant authorities, such as the Labour Inspection. The employer also informs the safety and health Committee, the prevention Services. The Labour inspection, on its turn, enters the information of the reported event in “e-mars” (the European Major Accident Reporting System): <http://emars.jrc.ec.europa.eu/>.

Posting agencies – temporary work agencies – posting fraud

Article 3 of the Directive 96/71/EC defines three forms of posting. The Belgian (transposing) Act of 5 March 2002 does not distinguish between these forms. It is important to focus on the great number of foreign temporary work agencies that try to post workers.

Temporary employment is regulated by the Act of 24 July 1987 on temporary work, temporary employment and hiring of workers for the benefit of users. Temporary employment agencies must have an authorisation to ensure they have sufficient guarantees to perform this work. The license is given by the different Regions: Flemish Region, Walloon Region, and Brussels Capital Region. Some agencies (often Dutch) call themselves ‘posting offices’ and try to avoid the authorisation requirement.

Another important feature is posting fraud leading to social dumping and unfair competition. The “Social Labour inspection” within the Federal Public Service Employment, Labour and Social Dialogue defines 4 forms of posting fraud: the incomplete declaration of work performed (not all the hours worked are declared to the social and fiscal authorities of the sending country), fake posting certificates (A1), fraud stratagems and fictitious posted workers. Mostly the evidence for those abuses could only be gathered with the aid and assistance of the labour inspectorate of the home country.

The industry is confronted with unfair competition: a survey executed amongst Belgian contractors showed that 31 to 53% of the companies had received offers for subcontracting that they suspected to be unfair proposals. Not respecting minimum wages and employment conditions are the most frequently reported forms of unfair competition. The approached companies suspect as many as 27 to 29% of the firms are taking advantage of this and 50 to 60% of the firms mention the damage it caused to their activities. They estimate 25 to 31% of the work is lost by this ‘unfair’ activity (some 1.8 to 2.3 FTE, compared with the average construction size of 6 FTE).

Special LI unit for monitoring posting directive

In the Belgian Labour Inspectorate, there are 20 labour inspectors devoted to the control of foreign companies, including those which employ posted workers.

Around 1000 performances are conducted every year in this area and around 250 reports a-year are issued to the Public Prosecutor. For the whole Labour inspection as well as for this Special unit, yearly inspection programs are set by the head office, related to the choice of sectors as well as the use of the appropriate methods.

Conducted investigations by the special LI investigation team for posted workers:

2007	1.126
2008	1.172
2009	1.183
2010 (up to 15.09)	1.031

Non-complied minimum wages, reimbursements in euro:

2007	755.495
2008	984.928
2009	2.203.448
2010 (up to 15.09)	549.543

Number of penal reports to labour prosecutor:

2007	265
2008	330
2009	343
2010 (up to 15.09)	234

There is no obligation for posting companies to appoint a legal representative in Belgium during the execution of the works or in a later state.

The sectors where posted workers can be found are in fact all possible sectors. Some years ago it were the typical sectors, cleaning industry, construction, hotel sector, metal industries, agriculture, food industry, transport, metal industry, etc. Nowadays, it happens everywhere in all possible branches, software, trading, telecom etc,

The most common breaches are the infringements corresponding with the non-respect of the nucleus (hard core) provisions of article 3 of directive 96/71/EC (minimum wages, maximum labour time , periods of rest, etc...), but also, obstacle of the enquiry, refusal to show social documents, abuse of the posted worker status (false A1, Brazilians acting as Portuguese workers, posted workers residing permanently in Belgium, etc.), hiring out of workers without licence, non-respect of safety provisions, and sometimes, constructions set up for international tax and social security fraud... (letterbox companies acting as non official temporary work agencies).

SECTION 2. LABOUR INSPECTION POWERS TO INVESTIGATE BREACHES

The Labour Inspection law of November 16, 1972, updated on June 6, 2007 - determines the functions of so-called "social inspectors", including the monitoring of standards for safety and health at work and all labour issues, all it under the provisions of ILO Convention 81 (ratified by Belgium in 1957).

All Labour inspection services on the federal level find their legal ground for their acting in this Labour inspection Act. The inspection services of the different regions (Flanders, Wallonia and Brussels Capital region) also have their own statutory labour inspection decree, very much alike the federal Act. This Federal or Regional Labour Inspection Act

(or decree) stipulates the empowered rights of enquiries of inspectors, their duties, but does not allocate their respective competences “ratione materia”. This is done by each different law, rule or decree. The Labour inspection Act of 16 November 1972 has been integrated in the new “Social law Penal Code” entering in force since the 1st of July 2011.

The functions and competences of OSH and social labour inspectors are very much the same as all those of the other “classic” labour inspections of Member States with a longer tradition (like in France, Spain, Luxemburg, etc...).

The right to: set up any in-dept enquiry, control the company books, ask for the social documents, visit the workplace day or night, organise hearings or interrogations, hear witnesses, make video’s or photo’s, searching computers, visiting workplaces without prior notice, etc...When entering private places like domicile, they need a warrant of the judge. Summoning company representatives or other persons in the LI office is only possible on a voluntary basis.

For the LI, identification of workers is less of a problem. Inspectors may use all possible means for identification. More difficulties are encountered for finding, identifying or getting contact with the responsible representative of the employer.

Labour inspectors have very extended powers en are entitled to ask for information to all other public stakeholders but very limited towards third private companies, banks etc.

Collaboration between different inspection services is much stimulated by the government and foreseen by law. Even with the tax authorities, police forces. Collaboration is possible not only by exchanging information, findings of enquiries, on request or spontaneously except when a judicial proceeding or prosecution is already going on about the employer. Then, a green light must be given by the judicial authority for communicating by LI.

Joint investigations teams are nearly daily affairs in Belgium. This has everything to do with the combat of social fraud in all its forms, imposed by the government by means of joint and elaborated fraud inspection programs.

The social inspectorate services receive many tip-offs and complaints, coming from unpaid workers, social partners, competing companies or other authorities. The chance that the services will find an infringement through these tip-offs or complaints is real. The LI also selects its control targets after database consultations and risk assessment which leads to a number of sectors or typologies.

The collection of information about working conditions is very difficult if the employer is a foreign company, mostly without a Belgian office, and the cooperation with foreign authorities is crucial.

The structure of the LI services (complicated but simple)

As most of the social and labour regulations are made up on the national level of the federal State, the most important inspection services handling cross border issues are also those on the national level:

- The Ministry of Labour (called “Belgian Federal Public Service Employment, Labour and Social Dialogue”) has 2 autonomous inspection services:
 - The inspection of well being of workers (safety, hygiene and health, labour accidents, professional diseases): doesn’t have much experience with posted workers.

- The “social labour inspection” with full competence (hard nucleus of the directive 96/71/EC) and experience of posted workers.
- Beside the two mentioned, other inspection authorities sometimes are confronted with cross border issues:
 - on the national level: the Ministry of social security (for annual leave), the tax officers,
 - on the regional level : the inspections of the regions for posting agencies and licenses for temporary work agencies.

In the context of combating fraud, all inspection services and stakeholder public authorities cooperate under the impulse of the government.

The **SIOD/SIRS**, or the Belgian Social Information and Investigation Service is ‘a centralised structure for the fight against illegal work and social fraud and at the same time a reference structure concerning information and policy options for the fight against illegal work and social fraud’ and includes the General Council of Partners and the Federal Steering Bureau. In the strategic plans of SIOD special attention is given to the fight against cross-border fraud (SIOD). Within SIOD a working group with representatives of the different competent social inspectorate services is concerned with drawing up an inventory of problems related to posted workers and with efforts to solve them

District Cells are operational in each district with the task of organising the fight against illegal work and social fraud. In this context, posted workers are often found on the work spot. The national “social labour inspection” handles most of the further in-deep enquiries in these cases. The latter inspection has also started a ‘**Single Point of Contact (SPOC)**’, designed for the exchange of information with the inspectorate services of the Member States dealing with practical problems with monitoring terms and conditions of employment. It also has access to the new **IMI** (Internal Market Information System) module for the posting directive, in order to send and receive information requests to and from other M.S.

Within this ‘Social labour inspection’, a unit named **COVRON** “Control of foreign companies” is responsible for the fight against unfair competition by foreign companies and the fight against social dumping of foreign employees. A guide for the control of foreign employers provides an explanation of the legislation and the working method during the inspections on site. COVRON recorded 618 infringements by foreign companies during the inspections in 2008. Most infringements were committed by not respecting the remuneration conditions prescribed in the different collective agreements. It must be underlined that almost no aspects of OSH are included in these enquiries and findings as the OSH inspection does not cooperate.

SECTION 3. MUTUAL ASSISTANCE IN INVESTIGATION OF BREACHES

Mutual assistance regarding Convention of 29 May, 2000

Belgium has ratified the Convention by means of the law 9 December 2004. Article 3 of the law describes the principle, that „The Belgian judicial authorities provide for the widest possible mutual assistance in criminal affairs”.

From the side of the administrative authorities (Safety and Health inspection, Social Labour Inspection) the Belgian ratification of the Convention seemed to exclude administrative bodies and proceedings. There were serious doubts, that the convention

is applicable to administrative fines as the condition is stated that only those acts could be prosecuted which are punishable under national law of the requesting or the requested Member State.

Assuming that administrative bodies are excluded in the scope of the Convention, the Federal ministry of Labour is not foreseen to become competent body in the purpose of article 24. In addition to that, an exchange of information (Art. 7) by administrative bodies is not announced in Belgian law of 9 December 2004. If needed, information for LI (concerning a penal judicial issue) could be asked to the Public Attorney who can forward the question to his counterpart in another M.S.

In relation to evidences to be gathered in inspection proceedings it is considered that the Convention doesn't apply to this case. The legal basis for cross-border exchange of information and cooperation is the Belgian Labour Inspection Law (Art. 8), since 1st of July integrated in the Social Law penal code (article 57), which applies to the requirements of ILO-Convention 81.

The Belgian Labour Inspection Authority has often made enquiries that lead to imposed fines or penalties to other MS's companies but - in most cases administrative fines – were not paid voluntary. A lack of legal instruments to enforce collecting fines seemed to be the reason.

The representative of Ministry of Justice confirmed that the Convention is not applicable to administrative procedures. From their point of view the Convention is focussed on criminal matters. Following the public prosecutor's statements, the Convention covers only criminal procedures.

Although there was a broad conviction, that the Convention is not applicable to administrative proceedings, there may be clarified:

Convention Article 3 announces „Mutual assistance shall also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State ...”

So the question should be answered if administrative proceedings (which could be brought to a court by appeal) are covered by the Convention.

The problem, especially in a country with both procedures as Belgium, is the impossibility to determine the nature of the offence since the beginning of the investigation or inspection actions. In these cases, only once these actions are finished the Prosecutor decides about the convenience to follow up a criminal process or sending the file to the DG of the administration for imposing an administrative fine. This fact could also determine the impossibility to apply the Convention on Mutual Assistance on Criminal Matters **during** the inspection actions.

Internal law (“lex specialis”)

Quite unique amongst EU Member States, the Belgian LI Act, as a priority *lex specialis*, sets very important opportunities for external exchange of communication for inspectors.

It is important to note that social inspectors can exchange information with other labour inspectors from other Member States of the ILO or signed the Convention 81 of the body thanks to Article 8 of the Labour Inspection Act. These principles have been integrated also in the new “Social Law Penal Code” entering in force on the 1st of July 2011.

The information provided by other inspections will be used in the same conditions as if it had been obtained by inspection Belgian in the same way, it will act to further inspections by the process of acting itself, being able to allow even the presence of inspectors from countries those mentioned above in order to obtain data necessary for the proper performance of their business.

Article 8 of the Labour inspection law stipulates:

“With the services for labour inspection of other member states of the International Labour Organisation in which the Treaty number 81 concerning labour inspection in industry and commerce, approved by the law of 29 of march 1957, is valid, the social inspectors can exchange all information that could be useful for the surveillance tasks each of them is charged with.

The information obtained from the inspection services of other member states of the International Labour Organisation is used in the same way as similar information obtained directly by the social inspectors.

The information obtained for the benefit of labour inspection services of those member states are collected in the same way by the social inspectors as similar information gathered for the surveillance tasks they themselves are charged with.

The administrations of which these social inspectors are part, can also, in application of an agreement concluded with the proper authorities of a member state of the International Labour Organisation, allow the presence of officers of inspection services of this member state on the national territory in order to gather all information that could be useful for the surveillance task the latter has been charged with.

The information obtained abroad by a social inspector as a result of an agreement closed with a member state of the International Labour Organisation, can be used in the same conditions as the information gathered by the social inspectors in our own country.

In implementation of such an agreement the administrations to which the social inspectors, as mentioned in the first paragraph, belong can also proceed to other forms of mutual aid and cooperation with the labour inspections of other member states of the International Labour Organisation.

The provisions mentioned in paragraph one to six apply also to the agreements closed between the proper authorities in Belgium and the proper authorities of states that have not signed the Treaty number 81 concerning labour inspection in industry and commerce, approved by the law of 29 of march 1957. (Modified by law 20.07.06)”

Bilateral agreements

Belgium has bilateral agreements with France, Luxembourg, Poland, Portugal and informal exchange with the Netherlands, Germany, Bulgaria, Romania, Baltic States, Czech Republic and Slovakia.

The agreements are administrative agreements between the respective inspectorates themselves and are not legally binding. They promote exchange of information about know-how, findings and facts of enquiries and in general information about legislation and employers. They don't allow sending judicial documents that are subject of proceedings. They are more informal ways of collaborating. No official requests for mutual assistance are foreseen. For data protection, each partner of the agreement must apply and respect its own country rules. In border regions sometimes joint inspection teams take place

(Belgium-France, Belgium-Luxemburg). The “visiting” inspection provides stand-by help to the host inspection in a passive way, e.g. for hearings of workers on a construction site.

For OSH issues, the KSS (Knowledge sharing system) has proved to be very useful with these countries. The Belgian OSH LI unit is manager of the KSS site and from that point of view has the advantage of practice and knowledge of the system.

Mechanisms to communicate to other labour inspectorates

The Belgian LI set up a communication system (SPOC's) and KSS (for OSH issues) with colleagues from other Member states. Both social LI and OSH LI have access to IMI.

Nonetheless, difficulties remain, especially for information asked to less cooperative inspectorates of some Member states. In some countries, information just is not available or the LI is not competent (E.g. the U.K.).

Data protection in mutual assistance

a) Data transfer on mutual assistance under the 1st Pillar

In Belgium Convention n. 108 and the Directive 95/46/EC have been transposed.

Legislation allows data transfer of findings and outcomes of enquiries between Labour Inspectors who are under the same authority and the access of Labour Inspectors to Social Security data bases without significant restrictions when the Inspectors sign the charter of preconditions about their use, respecting the general principles of the Directive 95/46/EC which is generally applied in the relationships between Government and citizens in integrated electronic systems.

Legislation on data protection in Belgium only aims at natural persons. But information about legal persons however must be treated with respect, confidentiality and the penal secret must be kept.

Regarding the data transfer to other public authorities, legislation allows the transfer on a case by case basis. No consent of the subject is needed for transferring data to other authorities, but the subject has the right to consult his own file once the enquiry is finished, without having access to topics covered by the penal secrecy.

Cooperation, mutual assistance and exchange of information transferring personal data with foreign labour inspectors is regulated by Article 8 of the Labour Inspection Law (article 57 of the Social Law penal code) which stipulates that “with the services for labour inspection of other member states of the International Labour Organisation in which the Treaty number 81 concerning labour inspection in industry and commerce, approved by the law of 29 of march 1957, is valid, the social inspectors can exchange all information that could be useful for the surveillance tasks each of them is charged with”.

Therefore, information obtained from the inspection services of other member states of the International Labour Organisation which have ratified 81^o Convention can be used in the same way and conditions as similar information obtained directly by the Belgian Labour inspectors.

In fact, in numerous cases, the primary findings of Belgian labour inspectors on the workplaces or the construction yards, are completed by additional information or confirmation received from the labour inspection from the country of origin.

b) Data transfer on Mutual Assistance under the 3rd Pillar

The labour inspectors, according to their own legislation (Labour Inspection Act of 16 November 1972), don't have the quality nor capacity of judicial police officers.

Their acts and investigation powers are not regulated by the criminal investigation code but by the labour inspection law which is to be considered as a *lex specialis* (with legal priority).

The penal nature of the procedure can only be determined by the Public Prosecutor once the Labour Inspector's enquiry has finished and that occurs only in the 30 per 100 of cases. Therefore, the criminal nature of the offence cannot be determined since the start of the labour inspection actions and the chance to appeal the labour inspector's decision to a penal court or a court specialized in particular in criminal matters cannot be always assured and it is not probable.

The direct consequence is that the Convention on Mutual Assistance in Criminal Matters and the Framework Decisions adopted within the 3rd Pillar or the current Title V of TFUE cannot be safely applied in Belgium for enforcement actions.

In conclusion, collaboration and Mutual Assistance in enforcement matters by Belgian Labour Inspectors with their counterparts in other Member States could only be undoubtedly developed within the first Pillar instruments of Community Law without infringing personal data protection especially thanks to article 8 of the Belgian Labour Inspection Law.

SECTION 4. INTERNAL PUNISHMENT PROCEDURES

Under Belgian law, the findings of the inspection action can take several forms as an outcome: (especially for OSH matters)

- a) Inspection report with positive comments on business conduct
- b) Inspection report without comment
- c) Report with warning for remedying situations
- d) Confirmation of oral warnings made at the time of the visit,
- e) Written warnings for the correction of legal violations,
- f) Imposition of regularization of abnormal situations, with or without lead time,
- g) Cessation:
 - Temporarily or permanently prohibit the development of work in workplaces both concrete and preventing the use of equipment, substances or inappropriate methods.
 - When the risk seems imminent, the social inspector may order the immediate evacuation of the workers present in the workplace, even to order the sealing of the premises.
- h) The process of finding a verbal underlying offense as evidence of crime
- i) Establishment of written agreements or arrangements by which the employer is located to the correction of the breaches,
- j) Invitation to audition, that is, to appear before administrative agencies.

A) Judicial proceedings: the Criminal Action

To enforce laws and regulations, the social inspector has three types of legal instruments, being himself responsible for the election:

- Giving all useful legal information to the employer in order to comply
- The warning,
- The warning with fixed deadline for rectification of the fault warned,
- The written penal report to the Public Prosecutor (in Belgium the “Labour Auditor”), with a copy within 14 days to the offender and one to the Director General of Research Department of the Ministry of Employment (responsible for administrative fines).

The initiation of proceedings for the auditor will work as a representative of Public Prosecutions before a criminal court.

The auditor has 6 months from the receipt of minutes to give its decision on the start of proceedings, which can be extended when additional information is needed.

After the deadline, the auditor chooses:

- or to institute criminal proceedings
- or not engage in criminal proceedings in which case the administrative penalty proceedings initiated.

The Directorate General of Research Department may:

- Initiate an administrative penalty,
- Proceed to file actions.

If the auditor decides to engage in criminal proceedings, he brings it to the common usual penal tribunal.

The decisions of the penal tribunal may be appealed to a chamber of appeal in criminal matters, which decision on its turn may be referred to the Court of Cassation, if it was considered that there are formal deficiencies, well understood that there are reasons a decree of nullity.

In criminal matter new minimum and maximum punishment rules and fines have been established by the Social Law Penal Code entering in force on July, the 1st.

Infringments	A: administrative sanction S: penal prosecution	Imprisonment	Penal fine in Euro	Administ. Fine in Euro
level 1	A			55-550
level 2	A+S		275-2.750	137,5-1.375
level 3	A+S		550-5.500	275-2.750
level 4	A+S	6 months-3 years	3.300-33.000	1.650-16.500

Infringements on OSH can be found in different levels depending their seriousness or impact.

The penalty can be multiplied depending on a number of parameters (number of workers, formants, etc.) Without exceeding the maximum fine multiplied by 100, the repetition of the offense can double the penalties.

The liability to pay a criminal fine for the employer, even if those convicted are their representatives.

B) Administrative proceedings

As mentioned above, the Directorate General of Research Department is studying the possibility of initiating the administrative proceeding or action file.

In case of the administrative proceedings there are two possibilities:

- Acceptance by the employer and payment of the appropriate administrative decision
- Appeal to the Labour Court who can declare or inadmissible from the penalty or reduce the amount of the fine or abolish it.

The administrative penalty must be paid within 3 months from the date of notification while it may be a postponement or partial payment in no case exceeds the annuity. The sanctions are described in the table above.

The administrative penalty is always imposed on the employer, even if the offense is committed by someone in your organization.

SECTION 5. MUTUAL ASSISTANCE AND MUTUAL RECOGNITION IN FINANCIAL PENALTIES

The principle of territoriality

In Belgium, in the domain of social law the general rule is that the infringement (or at least one of its constituent elements) should be committed on Belgian territory, irrespective of the nationality of the actor. If one of the constituent elements has taken place in Belgium, the prosecutor may decide that the infringer should be sued in Belgium for the whole infringement and under Belgian law. In some exceptional cases a Belgian employer or worker can be sentenced in Belgium for infringements committed abroad, as is the case with non-compliance with driving and rest time in international transport of goods.

On the other hand, in principle there are no such things as legal provisions, falling within the competence of labour inspectors, which regulate the application of foreign OSH rules on the Belgian territory.

To sum up, a foreign person who commits an offence in Belgium can be sued and convicted by a Belgian court for, as a rule, the nationality of the offender is no impediment to their being tried in Belgium.

The FWD 2005/214/JHA

- A) **Generalities:** The Framework Decision 2005 (FD 2005) is going to be transposed in Belgian law; a draft law was approved by the government a year ago but could not be brought before Parliament since then (because of the fall of the government).

As a result, there were no cross-border proceedings in which Labour Inspection Authorities had been involved. Neither OSH-fines imposed by Belgian authorities nor sanctions imposed by other MS were enforced. There were only cross-border activities concerning enforcement of (informal) exchange of information (SPOC's, KSS). In 20% of the cases administrative fines have been paid on a voluntary basis without any proceedings.

Bilateral agreements applicable exceeding, simplifying or facilitating the Framework Directive procedures concerning condemnations to fines do not exist (yet).

B) As regards **the project of transposing law**, the following rules are essential (all being provisional as the law has not been voted by Parliament yet):

According to the draft legislation, the local Public Prosecutor of the residence or the domicile of the concerned person is the authority competent to decide on the execution of the financial penalty.

The draft legislation has foreseen the involvement of a central authority but only for some very limited task.

Judicial authorities have an obligation to inform the Ministry of Justice (SPF Justice) when they have refused the execution on the grounds that they have serious reasons to believe that the execution of the decision would affect the fundamental rights of the concerned person.

When there is a will to derogate to the rules established by the Framework decision concerning the destination of the money collected, the Minister of Justice may agree on that question with the issuing State.

On the basis of the draft legislation, compensation imposed for the benefit of victims, where the victim may not be a civil party to the proceedings will be covered and will have to be enforced in Belgium, although this concept is not known under Belgian law.

Monies obtained from the enforcement of decisions shall in principle accrue to the executing State. However, as an exception, the possibility will be provided that both States otherwise agree, notably in the case of Article 1, b) ii) of the Framework Decision, so that monies may accrue to the victim.

It is envisaged that article 3 will be transposed in our domestic legal order as a mandatory ground for refusal.

Article 20(3) will also be transposed (grounds for refusal).

It is envisaged that the following grounds for refusal will be transposed as mandatory:

- Double criminality (Article 7.2, b) of the Framework Decision);
- Non bis in idem (Article 7.2, a) of the Framework Decision);
- Immunity (Article 7.2, e) of the Framework Decision);
- Person who cannot be criminally liable because of his/her age (Article 7.2, f) of the Framework Decision);
- Fundamental rights (Article 3 and 20.3 of the Framework Decision).

For legal certainty, there is no reason for the competent authority to apply those grounds for refusal on a case-by-case basis.

It is envisaged that the 70 Euro ground for refusal will be transposed as optional.

The principle of liability of legal persons however has been introduced in the Belgian domestic legal order and decisions imposing financial penalty on legal persons will be recognised in Belgium.

Criminal fines can be imposed on legal persons since Belgium knows the principle of criminal liability of legal persons (Article 7bis¹° of the criminal code). The Belgian law provides for such a possibility e.g.:

- Administrative fines imposed by a local authority/municipality (legislation of 13 May 1999)
- Administrative fines imposed in the context of the legislation of 21 December 1998 on security during football games.

The concerned person is always informed in writing when the Public prosecutor decides to take a positive decision on the execution of the financial penalty. Following this information, this person has the possibility, within 30 days of the notification of the decision, to invoke a ground for refusal and to transfer this information to the Public prosecutor.

When the concerned person can prove that she has paid the financial penalty in whole or in part in another Member State, the Public prosecutor consults the competent authority of the issuing State. The Public prosecutor has to inform the concerned person on the new decision taken on the basis of the information collected. Others grounds for refusal listed in the draft legislation may also be cited by the person.

If the Public prosecutor still decides to execute the financial penalty, the concerned person may present the case to the criminal court within 15 days from the notification of the last decision. The latter decision may be appealed in Cassation.

- C) There were general doubts, whether the **administrative authority** (DAG – Service of the administrative fines of the Federal Ministry of Labour) could be considered as “an authority of the issuing state... provided that the person concerned has had an opportunity to have the case tried by a court have in **jurisdiction in particular in criminal matters**” in terms of the FWD, Art. 1a) ii. As decisions of the Service of administrative fines can be taken into appeal only to the Labour Court, which is not a criminal court, the FWD 2005/214 was not considered to be applicable to administrative fines.
- D) There were also **doubts, if the core provisions of the Posting Directive 96/71** (transposed in Belgian Law of 5 March 2002) **are covered by the FWD 2005/214**. The question was if infringements in the framework of Posting Directive fall under the scope of **Article 5** (esp. last topic). It could not be clarified, if those infringements are connected with the wording of the topic “offences established by the issuing State and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty”.
- E) To summarize the findings with respect to the Framework decision there were doubts if the infringements on the Belgian Law (5 march 2002) and other sanctioning procedures (i.e, Law of 30 June on administrative fines) were applicable.

Conclusions: (that might also be interesting for other M.S.)

With regard to legal pillar FWD 2005/214 there are some proposals for clarification or amendment:

If – from the point of view of legal experts (Member states and Commission) – social and OSH-law infringements are covered by the FWD 2005/214 only in case of criminal matters. With regard to the content of Article 5 (1) (offences), it has to be verified that only criminal offences are in focus.

It should be clarified the meaning of Art. 5 (1), last topic: do the infringements on the provisions of the posting directive fall under this regulation

It should be considered, if the topics enumerated under Art. 5 (1) could be amended by explicit mentioning and adding infringements on occupational health and safety and posting directive regulations, especially those regarding the hard nucleus of provisions.

It should be clarified the possibilities to use Art. 5 (3) for other offences than those foreseen by paragraph 1 on OSH and posting directive offences. In this context it has to be analysed the meaning of the word “offence” (only criminal or criminal and administrative, see above).

REPORT CONCLUSIONS

Inspection services in Belgium face many problems in executing control in the case of posting of workers and they are convinced that the existing instruments do not suffice to carry out effective controls. Even if it were possible, abuses are so widespread that inspectorate services never seem to get a real grip on the existing problems. During the last five years positive steps have been taken in the supervision of posted workers. E-Government and the use of databases, but also the intense co-operation for tackling social fraud and illegal work confirm this impression. Nevertheless the social inspectorate is still facing problems during their inspections on site. For the social inspection services the only effective instrument to tackle abuses is the introduction of liability of the client (exclusion of private clients) or the principal contractor for the wage debts of the subcontractor.

Mutual assistance amongst authorities of M.S., in the phase of the enquiry, will certainly have a boost once the IMI platform is on full speed, but will never solve the difficulties on the spot. One of the greatest problems is the very temporary nature often of posting and the (too much) post factum control of it.

Involvement of social partners in the enforcement process can only be of some help in the phase of search, selection of targets and enquiries... Those social partners have not enough resources for enforcement but they can offer lots of useful information to labour inspectors in fraud sensitive sectors. The Belgian labour inspection developed some tri- or bi-partite protocols on the level of communication of facts, problems, know-how and phenomena in certain sectors which are quite useful. Social partners, on the other hand, have an important preventive role to play by informing their members and setting up info campaigns, making leaflets, brochures etc.

Executing fines are only possible if they are from a penal nature. Only 30% of all prosecuted infringements lead to penal fines, the other 70% are administrative fines (in second order). For the latter, executing Belgian administrative fines is most problematic as those fines can only be appealed before the Labour court.

The new Social Law penal code nor the transposing law (pending) give a solution to that problem.

2. REPORT ON MALTA

SECTION 1. INFORMATION AND STATISTICS ON POSTING OF WORKERS AND PROVISION OF SERVICES IN MALTA

According to Maltese legislation, companies coming from other Member States within a provision of services do not need to register, but in the case of posted workers, data is collected through a notification process.

There exists no legal requirement in the Maltese labour legislation requiring foreign undertakings to appoint a legal representative in Malta.

As regards statistics on posting of workers in Malta, the Department of Industrial and Employment Relations received notifications on posting of workers in Malta as follows:

2007	326
2008	452
2009	299

From data collected by the Department of Industrial and Employment Relations, it transpires that workers posted in Malta are posted as follows;

Construction	49,81%
Banking	12,25%
Training	33,44%
Other	4,5%

The Maltese Labour Inspection Authority does not have any sort of statistics on fines that have not been notified/ enforced to posting companies. No significant irregularities concerning posted workers were encountered during inspections.

Notification of work related accidents is required if a posted worker is injured in Malta. No notification is needed of workers employed by Maltese companies who are injured while posted outside Malta.

SECTION 2. LABOUR INSPECTION POWERS TO INVESTIGATE BREACHES

Scope of the Maltese Labour Inspectorate's activities

The Occupational Health and Safety Authority (OHSA) has the task of monitoring Health and Safety at Work without any intervention in other matters related to the Directive 96/71.

The Department of Industrial and Employment Relations is the competent authority that is responsible for Directive 96/71. The monitoring and enforcement of conditions of employment (such as wages and working time) of posted workers fall within the remit of such Department. Cases of undeclared work are referred to the Employment and Training Corporation which is responsible to deal with such cases.

Powers of the Maltese Labour Inspectorate

Breaches of the law are investigated by the OHSA, which can initiate judicial proceedings against the person/s suspected of having committed a contravention.

In terms of the law, the Chief Executive Officer has the opportunity to examine or cross-examine witnesses, produce evidence, make submissions in support of the charge and generally conduct the prosecution on behalf of the police.

In terms of the OHS Authority Act 2000, the OHS Authority is empowered “to carry out any investigation on any matter concerning occupational health and safety, including but not limited to the investigation of any accident, injury, disease or death occurring a result, or by reason of, any association with work, as well as investigations to ascertain the level of occupational health and safety provided at any work place, and the duty of the Authority to secure the enforcement of any provision of this Act shall not be reason to debar the carrying out of such investigations” (Section 9 (1) (j) of Chapter 424 of the Laws of Malta).

The Authority is also empowered to collate and analyse data and statistics on occupational injuries, ill health and deaths, and on matters ancillary to occupational health and safety; provided that the Authority may request data or information on any matter related to occupational health and safety, and such data or information shall be provided forthwith; provided that any such data or information shall be deemed to have been given and received under the obligation of confidentiality” – section 9 (1) h of Cap. 424.

This specific section of the law has never as yet been invoked in the case of banks, constituted bodies or associations, but only because there was no need to request it, not because it is precluded at law. Requests for information have been made to other Government entities or Departments, and such requests have always been complied with.

Chapter 424 also lists a number of powers incumbent upon OHS officers, including (but not limited to) the right of entry (to enter freely and without previous notice in any work place at any time of day or night, to request the assistance of a member of the Police force in the execution of duties and to question any employer or worker on any of the matters falling under the Act.

The law does not specifically refer to the **summoning** of persons to the premises of the Authority, but neither is this precluded at law. In actual fact, should OHS Officers request to speak to any person (an employer or worker), a letter with such a request is issued, which if not obeyed, is followed by the issue of an Order by an OHS Officer to meet.

There is usually full **cooperation** between entities. There have also been numerous situations where joint inspections were carried out. In such instances, the scope and parameters of the inspection campaign are discussed and agreed upon before the start of the campaign.

Eventually, the OHSA can send its reports either directly to the Public Prosecutor or to the Police.

Data Protection during the investigation

With regard to data protection of OSHA files, such data falls under the Maltese legislation in terms of Chapter 440 of the laws of Malta which transposed the Directive 95/46. Maltese Data Protection laws cover only data pertaining to an ‘individual’ not to legal persons.

The criteria for processing personal data are restricted to data where-by (among others) “the subject has given his consent”, “processing is necessary for the performance of an activity that is carried out in the public interest or in the exercise of an official authority” and “processing is necessary for a purpose that concerns a legitimate interest of the controller or a third party to whom personal data is provided, except where such interest is overridden by the interest to protect the fundamental rights and freedoms of the data subject”.

In terms of Maltese legislation, exemption to the right of information exists whereby information as a necessary measure in the interest of (among others), “the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions” or “a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority referred to the above mentioned activities”.

SECTION 3. MUTUAL ASSISTANCE IN INVESTIGATION OF BREACHES

The Convention of Mutual Assistance in Criminal Matters

Malta has ratified the Convention of 29 May 2000 through the Instrument of Accession of Hon. Tonio Borg dated 31st March 2008 including attached declaration containing reservations on certain parts of the Convention and indication of the designated central authority and the designated contact point (hereinafter the “Declaration”).

As per the Instrument of Accession, Malta also ratified the Protocol of 16 October 2001. The Declaration attached to the Instrument of Accession contains certain reservations which are not specifically intended for OSH matters. However, it must be kept in mind that OSH breaches are prosecuted in courts of criminal judicature, and the provisions of the Criminal Code, save a few exceptions, apply to such breaches. Therefore, OSH sanctions can be affected due to the general applicability of the reservations to cases of a criminal nature.

There is no specific Act implementing the Convention. However, the following articles of the Criminal Code effectively ensure that Convention is part of Maltese national law:

- Article 435AB regarding the temporary surrender of a person in custody to a foreign country;
- Article 435B regarding powers of investigation in connection with offences cognizable by courts outside Malta
- Article 435BB regarding Temporary surrender of person in custody to Malta.
- Article 435E regarding controlled deliveries and joint investigations with the competent authorities of other countries.
- Article 647A regarding audio-recording or video-recording of evidence.
- Article 647B regarding sending of documents or any act to person in a foreign country.

- Article 649 regarding the examination of witnesses, investigations and search and/or seizure in connection with offences cognizable by courts of justice outside Malta.

In essence, these provisions refer to any treaty, convention, agreement or understanding that Malta may be a party to and provide that requests shall be honoured *in accordance with such treaty, convention, agreement or understanding*.

According to the statement provided for in article 24 of the Convention, the authority that are competent for the purposes of articles 3 (1) and 6 (1, 2 and 6) of the Convention is the Office of the Attorney General.

In relation to transmission of requests for mutual assistance, Malta has opted out of the application of article 6(6) altogether; hence no such conditions are stated.

With regard to spontaneous exchange of information (article 7), Malta does participate in this matter; however any imposition of conditions on the use of such information is a matter in the charge of the Executive Police.

In relation to the evidences gathered in the inspection proceeding from abroad, physical evidence, samples, documentary evidence, statements, confessions, etc., in terms of article 399(1) of the Criminal Code and articles 618 and 619 of the COCP, when the court decides that the examination of any witness or any other process of the inquiry by an authority outside Malta is indispensably necessary, a procedure is adopted whereby a letter of request and the court's decision is served on the Attorney General who may within five working days make any submissions in writing as he may deem appropriate.

The registrar, upon a decree to be made by the court for the purpose, then draws up a letter of request addressed to one of the judges/magistrates/other person of the place in which the request is to be executed, requesting the examination on oath of the witness in question.

As a general rule, this letter of request is then transmitted by the registrar to the Minister of Justice, who in turn forwards it to the proper authorities with a request that it may be executed. However, this formality of transmitting via the Minister can be done away with by the court *“where any treaty, convention, agreement or understanding, between Malta and another country or which applies to both such countries or to which both such countries are a party, provides for direct transmission of letters of request between judicial authorities.”*

This is indeed the case with the Convention at hand which in Articles 6 and 7 provides for transmissions of requests for mutual assistance and spontaneous exchange of information. Therefore, the Convention of 29th May 2000 is applicable to this matter.

With regard to the acceptance of evidences by the Courts of law, the Code of Procedure prescribes a vast range of detailed rules on evidence, but the general principle is that the best possible evidence available should always be produced – e.g. although in criminal cases the use of written declarations of a witness (“affidavit”) is much more limited than in civil suits, affidavits are still admissible as evidence, however, a viva voce deposition is preferred and the opponent always has the right to cross-examine a witness who prepared an affidavit.

The Convention 2000 is the only instrument applicable on this matter in Malta and there is any bilateral agreement with EU countries in order to simplify or facilitate the Convention procedures,

Transmission of data and information to other public bodies

In general terms, the information to the data subject requires a previous request from the data subject unless authorisation is solicited and obtained from the Data Protection Commissioner.

When data are collected from a person other than the data subject, the latter must be informed. The controller or any other person authorised by him in that behalf shall provide the data subject with at least the following information, except where the data subject already has it:

- (a) The identity and habitual residence or principal place of business of the controller and of any other person authorised by him in that behalf;
 - (b) The purposes of the processing;
 - (c) Any further information including:
 - (i) The categories of data concerned;
 - (ii) The recipients or categories of recipients;
 - (iii) The existence of the right of access, the right to *DATA PROTECTION* rectify, and, where applicable, the right to erase the data concerning him; and insofar as such further information is necessary, having regard to the specific circumstances in which the data is processed, to guarantee fair processing in respect of the data subject.
- (2) The information referred to in sub article (1) shall be provided at the time of undertaking the recording of personal data or, if a disclosure to a third party is envisaged, not later than the time when the data are first disclosed.

The Maltese law lays down exception that is based in particular on reasons related to the protection of the data subject or the protection of the rights and freedoms of others, but shall not apply when a law specifically provides for the provision of information as a necessary measure in the interest of (among others) “the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions” or “a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority” referred to the above mentioned activities.

With regard to the transmission of data to other public bodies in the framework of the performance of duties such as the persecution of offences, in terms of law, this is regulated and limited to the Data relating to offences, criminal convictions or security measures and may only be processed under the control of a public authority.

For this purpose, the Minister may by regulations authorise any person to process the data referred subject to such suitable specific safeguards as may be prescribed: provided that a complete register of criminal convictions may only be kept under the control of a public authority.

With regard to the possibility that the authorities and/or labour inspectorates from other Member States are recipients of transmission of personal data, in general, whenever the controller requires to transmit personal data the OSHA shall notify the Commissioner before carrying out any wholly or partially automated processing operation or set of such operations intended to serve a single purpose or several related purposes. The Minister may prescribe on any matter relating to the form of notification to be made under the law.

In any case, Malta has no records of cases in which the competent Courts of Law for imposing sanctions on OSH has needed evidences from other Member States or has been requested to send evidences to other Member State.

Currently, there are no arrangements for sharing enforcement information with other Countries.

SECTION 4. INTERNAL PUNISHMENT PROCEDURES

The principle of territoriality

The law of Malta allows prosecution of an offence when committed outside its territory in the particular cases referred to Article 5 of the Criminal Code, but this exception does not apply to OHS offences.

Judicial proceedings

In Malta, the proceedings are usually judicial before a Criminal Court and the OHS Authority (OSHA) conducts the prosecution on behalf of the police, but not as judicial police.

In terms of the law, the Chief Executive Officer has the opportunity to examine or cross-examine witnesses, produce evidence, make submissions in support of the charge and generally conduct the prosecution on behalf of the police.

The OSHA can send its reports either directly to the Public Prosecutor or to the Police.

Inspectors can be called as witnesses but not technical/legal experts. However, the Police also have the right of prosecuting in terms of the Criminal Code, in which case, it is up to the Courts to decide whether to call Inspectors as witnesses.

The Courts of law which rule the proceeding could be the Courts of Magistrates or the Courts of Judicial Inquiry in cases of fatal accidents or accidents resulting in grievous injuries. In the majority of instances, the Courts would be summary Courts; the decisions are only given orally.

In any case, the law lays down that the person concerned has to be always personally informed of the proceeding and has right to contest the case and it is necessary that he or she appears personally in the legal proceeding

With regard to the burden of proving rules in the judicial proceedings, except in certain specific cases, in Malta the general rule is that the burden of proving a fact rests on the party alleging it. In criminal proceedings, the prosecution has to prove its case and the accused is presumed innocent unless and until proven guilty beyond reasonable doubt.

Although this general rule also applies to breaches committed in terms of the Occupational Health and Safety Authority Act, most subsidiary regulations enacted under the Act contain a provision inverting the burden of proof and this by prescribing as follows:-

In any proceedings for an offence under these regulations consisting of a failure to comply with a duty or requirement to do something, or to do something so far as is reasonably practicable, it shall be for the accused to prove (as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement.

On conviction, a person who commits an offence against the Act or subsidiary legislation is liable to imprisonment for a period of not more than two years or to a fine of not less than €466 but not exceeding €11,647, or to both such fine and imprisonment; moreover the Court may, at the request of the prosecution, cancel all or any licences, warrants or permits issued to or in the name of the person found guilty in connection with the work place where the offence was committed.

Administrative proceedings

The OHS Authority Act also provides for a system whereby a person who contravenes the provisions of the Act may be intimated for the payment of a fine in lieu of judicial proceedings. The fines are determined according to a Schedule of applicable fines as determined by the OHS Authority. The OHS Authority Act requires that an administrative fine cannot exceed the minimum pecuniary penalty that can be imposed by the Court of Law.

An appeal against an administrative fine is not permissible. The intimated person need not pay the fine, in which case, judicial proceedings would be initiated, not for failure to pay the fine, but for the contravention. The law provides that no proceedings shall be taken against any person who, after receiving an intimation by the Authority for the payment of a penalty not exceeding €466 for having contravened the provisions of the Act or of any regulations made by virtue of the Act, and pays such penalty to the Authority in either case within fifteen days from the date of receipt of such intimation.

Following a decision taken by Cabinet in December 2010, the OHS Authority will later on this year, launch such a system following the implementation of a Pilot Project, which will identify any teething troubles in the early stages of its implementation. For this purpose, the OHS Authority has developed a Standard Operating Procedure (SOP) for the administration of the system, which is being made public in the interests of equitable and good governance. The OHS Authority has established two applicable penalties: €450 and €200.

The only distinction that is made in the law about infringements concerns the most serious offences in terms of the Criminal Code (grievous bodily harm or fatal accident) that are prosecuted only under such Code, rather than under the OHS Authority Act.

Responsible persons

The fines and penalties can be imposed only on individuals, but an accused person can either be charged in his personal capacity or in his capacity as a company director. Penalties can be imposed on either capacity.

An employer being a state entity is not immune from the imposition of sanctions, thus it can still be found guilty and ordered to pay a fine for a breach of occupational health and safety rules.

SECTION 5. MUTUAL ASSISTANCE AND MUTUAL RECOGNITION IN FINANCIAL PENALTIES

The FWD 2005/214/JHA

Malta has transposed the FWD 2005/214/JHA by the Financial Penalties (Execution in the European Union) Regulations (Legal Notice 268 of 2009), hereinafter the “Regulations”, enacted under the Criminal Code.

In relation to Article 2 of FWD the authority or authorities that are competent as both issuing and executing are foreseen in the Regulation 4 of the Regulations which provides as follows:

- (a) *The Attorney General shall be competent to receive decisions issued in the issuing State and to transmit to the executing State decisions issued in Malta by the courts of criminal justice;*
- (b) *The courts of criminal justice shall be competent to issue a decision.*

Therefore, the competent authorities for the purposes of Article 2(1) of the FWD are the courts of criminal justice, and the competent authority for the purposes of Article 2(2) of the FWD is the Attorney General.

The standard form certificate contained in the Annex to the FWD requesting execution is accepted by the Attorney General in Malta. The Regulations make no express provision regarding the language in which the certificate should be drawn up. However, regulation 8 lists the grounds for non-recognition and non-execution of a decision. The ground dealing with the requisites of the certificate states that a decision shall not be recognised when it “is not produced, is incomplete or manifestly does not correspond to the decision”. By deduction one can conclude that the fact that a certificate is drawn up in a foreign language cannot justify non-acceptance of the decision by the Attorney General.

In terms of regulation 6 of the Regulations, in order to enforce a decision it shall contain a statement that the financial penalty relates to:

- (a) *Conduct which is a scheduled offence: Provided that in such cases there shall be no verification whether the conduct is a criminal offence in Malta; or*
- (b) *Conduct which would constitute an offence under the law of Malta if it occurred in Malta: Provided that the description of the offence shall not be regarded as material if the offence under the law of Malta and the law of the issuing State are substantially of the same nature.*

Occupational safety and health breaches do constitute offences under the law of Malta. Besides the schedule of offences includes the following category of the scheduled offences is the following:

offences established by the issuing State and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty.

Therefore if the fine results from an OSH offence arising from the implementation of the above-captioned EU legislative instruments, then it should also be enforceable in Malta.

Malta has transposed another Framework Decision on the execution of freezing orders in the European Union. However, this is not applicable to breaches of occupational health and safety rules.

In any case, in Malta there are no records of fines or penalties imposed in the last years to other MS’s companies which have not been collected or cases in which the competent courts for imposing sanctions have attempted to enforce a fine in another Member States or have been requested to enforce a sanction from another Member State.

3. REPORT ON HUNGARY

SECTION 1. INFORMATION AND STATISTICS ON POSTING OF WORKERS AND PROVISION OF SERVICES

Registration of posting companies

Contrary to other EU Member States, there is no independent legislation in Hungary for the regulation of posting, assignment and/or the hiring-out of workers only. The applicable rules are contained in Act XXII of 1992 on the Labour Code (LC) Act XVI of 2001 on the Amendment of the Labour Code transposed the requirements of the Directive 96/71/EC. The 2001 Amendment introduced Sections 106/A and 106/B on specific rules for posted employees.

According to the Government Decree 355/2007 companies are required to be registered in a public register held by Regional Labour Centres the employment of persons who have the right of free movement and residence except for the case of posted workers.

According to the Hungarian legislation posting companies are not charged with the obligation to appoint a legal representative in Hungary.

Data on posting workers

The Regional Labour Centres are the only ones having data on posted workers and there is not any exchange of this information between authorities. The data are closed and they can only be accessed by a legal aid basis between the authorities under a strong control.

The Hungarian Labour Inspectorate Authority has not any statistics on posting of workers and has not any means to access to this register information.

Inspectors are not entitled to log on database (Social Security one or any other). They can only access to database on undeclared work in order to check the affiliation or inscription of companies and workers in the Social Security System.

There are not specific statistics on unpaid fines to foreign companies. They have general statistics concerning both the foreign and Hungarian fines together.

Hungarian Labour Inspection will be able to gather information and data related to this matter as long as the Information Technology System is developed.

Experiences show that the most affected sectors are: construction and commercial/catering. The most common breaches committed by posting companies are related to infringements of rules on minimal wage payment were sanctioned by our inspectors in 2010.

According to the Hungarian legislation (MüM Ministry decree 5/1993 (XII.26) Article 9. c) posted companies whose centre is based in Hungary shall report work-related accidents and occupational diseases to the Hungarian Labour Inspectorate (regionally competent by the localization of the company headquarters).

SECTION 2. LABOUR INSPECTION POWERS TO INVESTIGATE BREACHES

Scope of the Labour Inspectorate activities

The Hungarian Labour Inspectorate has the task of monitoring both industrial relations and occupational health and safety, working separately in two different and specialized sections.

The Hungarian Labour Inspectorate, Labour Inspectorates of OSH and Labour Administration Bodies of Government Offices in the Capital and in counties are responsible to monitor required registration concerning employment.

The National Tax and Customs Authority is the responsible for the inspection and sanctioning regarding to the payment of contributions.

Powers of the Hungarian Labour Inspectors

Labour Inspectors can visit workplaces without a prior notice. According to the Act LXXV of 1996 on labour inspection, Section 4 (1) inspectors may carry out inspection at all places of work of the employer without any special permit and without the obligation of prior announcement.

They can you summon company representatives or other persons in their office. According to the Act CXL of 2004 on the General Rules of Administrative Proceedings and Services – Section 46 Where it is necessary to interview a client or his/her representative in connection with a proceeding, the inspector shall summon this person to appear prior to the time limit or deadline given, or at the place indicated.

Other inspection tools are enter to an area, building, inspection of documents, subjects or work process, asking information, taking picture, sound recording or other proves.

According to the main regulations the authority can not require information from private stakeholders regarding to the protection of personal data, but the client can be asked to implement his/her obligation on information.

Mutual Assistance with other public bodies

National Legal Assistance may be requested in two cases:

- A) If any procedural step is necessary outside the area of jurisdiction of the requesting authority;
- B) Where any data or document is required for the requesting authority to discharge its duties, that is in the possession of another authority, other government or local body, or - in connection with certain specific types of cases as specified in an act - another agency or person.

The partner authorities carry out joint investigations and actions more times a year (e.g.: tax authority, custom authority, foreign and immigration office, authority for customer protection).

Data Protection during the investigation

Hungary has transposed the Directive 95/46 into its National legislation.

Pursuant to Hungarian law on data protection the purpose, type, legal grounds as well as the source of data and those involved must be registered with the Data Protection Office.

Legal persons are subject to data protection and human rights except those concerning natural persons. The Law states that “the provisions on the protection of inherent rights shall also apply to artificial persons, unless such protection, by virtue of its very nature, can only be given to private persons” (Section 75 (2) of Act IV. of 1959 on Civil Code of the Republic of Hungary).

The Labour Inspectorate files which contain personal data are subjected to the control of the Data Protection Authority. Protection of personal data is a basic right.

SECTION 3. MUTUAL ASSISTANCE IN INVESTIGATION OF BREACHES

Mutual Assistance with other Inspectorates

The exchange of relevant information for the purpose of Labour Inspection performance with other Member States is made Via Direct International Legal Assistance or through the special posting module of IMI (testing the operation has started on 16th may 2011 in every Member States).

According to Article 4 of Directive 96/71/EC which has been transposed to the Hungarian legislation (Government decree 314/2010. (XII.27.) 9.§ (2): the competent body is the Hungarian Labour Inspectorate. The Hungarian Labour Inspectorate is responsible for the monitoring on the terms and conditions of employment and for cooperation with EU member authorities concerning labour inspection tasks. In the frame of international cooperation Hungarian Labour Inspectorate shall reply to requests for information on the findings of labour inspections and the content of labour legislation.

The Hungarian Labour Inspectorate signed a bilateral agreement on cooperation with Romanian Labour Inspectorate in 2008 on the field of inspection and exchange of information and experiences.

Hungarian Labour Inspection has unofficial agreement with border countries like Slovakia for establishing joint teams of inspection to act on agricultural work, especially on summer in an inter-regional border frame.

There is not a central authority to organize communications or transmission of information to other EU countries.

The Hungarian Labour Inspectorate is using the KSS for exchange of information with other Inspectorates.

Legal value of evidences collected by other Inspectorates

Evidence from international legal assistance or IMI is admissible in the Hungarian legal system. In the Hungarian legislation there is not any specific condition to accept these evidences.

Internal Legislation

The Hungarian Administrative Procedure Act foresees in article 27 that the authorities of Republic of Hungary may contact a foreign authority to request legal assistance when there is an agreement for mutual administrative assistance with any State or there is a reciprocity existing between the States or it is permitted under multi-lateral international agreement.

In the assessment of reciprocity the position of the minister in charge of foreign policies shall be authoritative, and it will be formulated in agreement with the minister having competence in connection with the case on hand.

Transmission of data and information to other public bodies

Dr. Bartfai Zsolt, Deputy Head of Department Privacy Secure Office which depends on the Ombudsman Office in the Parliament, attended to the meeting, reporting on the main features of the Hungarian Data Protection System.

We were said that only if there is a clear and precise legal grant in the Administrative Procedure Act, Hungarian inspectors may transfer to another Member State data or information about a natural person without the previous consent of the data subject. In case of OSH infringement committed by a self employee, as he is acting like a company, the information could be exchanged.

If there is no legal basis for the transmission of data, the specific permission of the concerned person is always required.

The Convention of Mutual Assistance in Criminal Matters

Hungary has ratified the Convention of 29 May 2000 through the “Act on Mutual Assistance in Infringements Matters No. 2007/36”. There are not additional protocols, reservations or declarations in the Act.

Hungarian Police Headquarters – Division of Administration is the competent Authority for the purposes of articles 3 and 6 of the Convention (“proceedings in connection with which mutual assistance is also to be afforded” and “transmission of requests for mutual assistance”).

In Hungary, only fatal work-related accidents are under criminal proceedings. For that reason, it is considered that the Convention of 29 May 2000 could only be applied in this kind of proceedings.

SECTION 4. INTERNAL PUNISHMENT PROCEDURES

Hungarian Labour Inspectors carry out the investigation of infringements on OSH and can impose fines in administrative proceedings which can be revised by Labour Courts.

The only exceptions are the investigations of fatal work-related accidents in cases of proven wilfulness which are normally carried out by the police under the instructions of the Public Prosecutor in a criminal judicial proceeding.

Labour Inspectors also can decide on the payment of Social Security benefits by the employer if there was a direct relationship between work-related accidents and OSH breaches.

The principle of territoriality

An offence committed in other country, by a Hungary based person, may be tried in Hungary, only if the fine is related to the Act on Mutual Assistance in Infringements Matters No. 2007/36 (as long as the offence is also an offence in Hungary). The decision of carrying out such proceeding is taken by a foreign Member State’s authority and the public prosecutor is the responsible for taking proceeding in such cases.

A foreign person who commits an offence in Hungary may be judged and convicted in Hungary.

Administrative proceedings

Hungarian Labour Inspectors are responsible for investigating breaches on OSH and investigation about non fatal accidents within an administrative proceeding whose decisions can be appealed to Labour Courts.

Labour Inspectors have the power to impose and levy administrative fines on the spot and other times the Authority of Labour Inspection decided of amount of the violation on the basis of the proposal of the inspector;

The National Tax and Customs Authority (NAV) is the competent authority for imposing OSH fines and collecting the outstanding. Unpaid administrative penalty is considered outstanding tax.

Administrative fines are always imposed and levied on employers (legal or natural persons), and there is not shared liability but subsidiary liability: the main contractor may respond when the subcontractor does not pay the fine.

The minimum and maximum amount of administrative fines for OSH breaches is 50.000 HUF (172 €) and 10.000.000 HUF (34.313 €) respectively. In 2009, the total amount of fines correspond about € 29 millions.

Judicial proceedings

Judicial proceedings before a Criminal Court take place in case of fatal accidents at work provided wilfulness is proved.

The police, generally, initiate the prosecution in these proceedings and Labour Inspectors can only intervene at these judicial proceedings as witnesses or experts.

The public prosecutor's office is responsible of the investigation when a fatal work-related accident occurs, and in general, an administrative fine is not levied until the public prosecutor's investigation is closed. Inspectors support the Public Prosecutor with evidences, when the latter, draws up the report.

SECTION 5. MUTUAL ASSISTANCE AND MUTUAL RECOGNITION IN FINANCIAL PENALTIES

The FWD 2005/214/JHA

Hungary has transposed the FWD 2005/214/JHA and Hungarian Police Headquarters – Division of Administration is competent as both issuing and executing State (regarding art.2), only accepting forms certificate requesting execution written in Hungarian.

According to Hungarian FWD transposing law, administrative fines (such as OSH fines) could not be enforced, seeing that only the fines under the scope of the FWD can be enforced.

Internal legislation

As we have mentioned above, according to the internal law Article 27 of Administrative Procedure Act, the Hungarian Authorities may contact a foreign authority for this purpose in a reciprocity basis between the States but we were said that the Ministry of Foreign Affairs do not transmit the legal aid requested by the Labour Inspectorate.

4. REPORT ON FRANCE

SECTION 1: "INFORMATION AND STATISTICS ON POSTING OF WORKERS AND PROVISION OF SERVICES"

The Declaration of posting

According to the French legislation¹, the Labour Code states four cases of posting which can be done within this framework. These are the three cases foreseen in Article 1.3 of the Directive 96/71/EC (under a contract, intra-group posting and temporary employment agency) and the law also foresees that companies can be posted to carry out a service on their own (for example the shooting of a movie in France when the producer is established abroad).

The specificities for the posting of workers are:

- Posting of workers is temporary in itself and no legal document sets its length.
- Employment relationship must have been established previously to the posting.
- The service provider has to demonstrate a significant activity in his original State.

Companies which are located outside of France have to comply with French national legislation during the period of posting including not only all the matters foreseen in article 3.1 of the Directive 96/71/EC but also basic rights and liberties of the employment relationship, including the right to strike, and illegal work.

The legal requirement to declare should be prior to posting period. The employer has to submit to the Labour Inspectorate office the declaration of posting. French law also requires in this declaration (Prior application form CERFA) the appointment of a representative of the company during the posting in France .

On the other hand, according to the rules of affiliation to social security (EC Regulation 883/2004) employees who have completed at least a month of social security affiliation in their Employers' State (or two in case of independent workers) may perform a posting period in France, remaining connected to their social security system of origin within 24 months. To this aim, employees are provided with a form A 1 (formerly "E 101").

Most common breaches of posted companies

Undeclared work is by far the most reported infringement committed by foreign undertakers in France by hiding of employees, and amount to less than 3% of recorded offences for undeclared work in France.

Furthermore, Article R 1264-1 of the Labour Code specifically represses the temporary posting of workers in the national territory by a company based out of France without prior notification, and article R 1264-2 represses the officer of a company not established in France who does not declare an occupational accident suffered by a posted worker.

Both offenses are classified as fourth-class and are punishable up to 750 euro fine.

¹ Labour Code in Articles L. 1261-1 to L. 1263-2 and R. 1261-1 to R. 1264-3, derived from art. 89 of "Law No. 2005/882 on small and medium enterprises and the Decree No. 2007-1739 - 11 December 2007, (adopted in pursuance of this Law), set out the rules applicable to French transnational posting of workers, thus completing the transposition of Directive 96/71/EC. The Circular of the DGT 2008/17 (5 October 2008) lists the procedures for posting of workers

Administration of posting declarations

The Labour Inspectorate has not any special team charged to monitoring posted workers, but locally, in the Region Rhone Alps (in the department of Ain), there is a section of the Labour Inspectorate which has developed a particular expertise on "specific status of employment" (including the posting of workers) and collaborates with all the other bodies of the Region on this issues.

On the other hand, the General Direction of Labour (Direction General du Travail -DGT-) collects each year the number of posting declarations received from all territorial units in order to do a statistical survey. A new program (France Migration Posting - FRAMIDE) is in process to be implemented. It will provide a national data base listing all companies which submitted their posting declaration.

The number of prior posting notifications received from the labour inspection services increases steadily each year since 2000. From 1,443 reports received in 2000 with about 7,495 posted employees to 38 000 reports received in 2010 with 111 000 posted employees.

YEAR	DECLARATIONS	POSTED WORKERS
2000	1.443	7.495
2003	3.426	16.545
2006	10.121	37.924
2009	35.000	106.000
2010	38.000	111.000

Sectors which are the main users of posting are:

1. Temporary work (which includes 38% of reports in 2010), mainly from 15 E.U. Members.
2. Construction (35% of reports in 2010)-Mainly coming from new E.U. Members
3. Industry (16 % of reports in 2010)

As it was pointed out at the technical visit, posting declarations from the tourist sector are steadily increasing, since nowadays it is usual to move complete professional teams.

The largest number of posting declarations comes from countries such as Germany, Poland and Luxembourg, followed by Spain, Portugal, Italy, Belgium and Slovakia.

There are three considerations in those surveys that were highlighted at the technical visit:

1. Communications does not collect the nationality of the displaced.
2. Most of the employers who post workers to France are from neighbouring countries. It has been much larger the number of declarations received from the countries bordering the north of France than from countries bordering the south. However, it is believed that this is due to problems in the files and on the data transmission from the "territorial units" of the south, rather than a real lack.
3. It is estimated that only one in three posting of workers to France is declared. Therefore the estimated number of posting workers to France in 2010 could be between 220 000 and 330 000.

SECTION 2 “LABOUR INSPECTION POWERS TO INVESTIGATE BREACHES”

Structure and competences of the Labour Inspectorate in France

The French Labour Inspectorate has a generalist approach and it has a global competence to inspect all the working condition matters, including wages, working time, illegal work and occupational health and safety according to the rules foreseen in the French labour legislation and the collective labour agreements.

Inspectors have a general competence except in public authorities and services, excluding the autonomous undertakings as the Railway Company, mines, and sectors depending from the Army & defence department and nuclear energy.

The Inspectorate is formed by labour inspectors and controllers who are integrated in the Ministry of Labour, Employment and Health. Since 2006 it is carried out a modernisation and fusion of all autonomous Labour Inspection divisions under one central authority, the General Direction of Labour (Direction General du Travail –DGT), covering all economical sectors, included transport of goods and persons, agriculture and seafarers who were monitored by independent administrations before.

The peripheral structure is divided in 22 regional directions, as well as 4 directions in the overseas territories. The regional directions carry out their tasks with absolute autonomy and the DGT can orientate on the sectors or aspects to inspect.

Powers to investigate breaches

The powers of the Labour Inspectors to investigate breaches, as it happens in the majority of European countries, are those indicated in the ILO 81 Convention:

- A) To enter freely and without previous notice at any hour of the day or night any workplace liable to inspection. The obstruction to the inspection entrance acquires the consideration of criminal offence.
- B) To out any examination, test or enquiry which they may consider necessary in order to inspect and the examination of any document considered like of obligatory possession by the Labour Code or complementary rules. As in the previous case, the denial is considered to be a punishable obstruction.
- C) To interrogate, alone or in the presence of witnesses, the employer or the staff of the undertaking.
- D) To verify the materials and substances used in the labour activity,

Labour Inspectors can also summon company representatives or other persons in their office when they have not found them in the workplace. If they do not come it can be also considered a punishable obstruction.

Labour Inspectors have the right to summon (or ask) other public bodies for information they need in the enquiry, but this right is not extended to private institutions, banks, associations etc.

Since the murder of two Inspectors in 2006 much more teamwork (small multidisciplinary teams) has been promoted and there is less internal obstacles between divisions of the LI and more joint cooperation of high grade specialists (engineers and medical skilled inspectors).

Mutual assistance with other public bodies

The collaboration among different public bodies and institutions has been largely favoured by the French legislation with exchange of documents and information or the access to public data bases. At territorial level several administrations of the State can organize joint actions, such as for the control of seasonal workers.

A lot of efforts are aimed at combating undeclared and illegal work. The Labour Inspectorate is not the only control oriented public service, but cooperates strongly with other public ministries, the social security agency/office, the Customs officers, police forces and so on.

Under the impulse of the government the fight against illegal work and fraud is brought to a higher level, and Labour Inspectors cooperates more together with the tax office (social fraud going hand in hand with tax fraud). This lead to the “Delegation nationale pour la lutte contre les fraudes”, a joint inter ministry action to which all inspectors must contribute in their daily inspection work. This shows a great synergy with the Belgian system, governed by the “SIOD”, social intelligence and fraud detection service, under the auspices of a secretary of State for fight against fraud).

The Minister of Labour is the guardian of this master plan and watches carefully for the special efforts done by LI for combating the “travail dissimulé” (hidden work).

Personal data protection during the investigation

The Labour Inspectorate files containing personal data coming from inspections are subjected to control by the Data Protection Authority which is the National Commission for Computing and Freedoms (Commission Nationale de l’Informatique et des Libertés –CNIL-). The constitution of a data base with personal data by the Labour Inspectorate has to be previously declared to that Commission.

French personal data legislation involves the physical and the legal persons.

Exchange of documents, data, findings of the enquiries are possible amongst inspectors, public authorities with a clear concern in these matters, with the exception of information and reports transmitted to the judicial authorities (in which case an authorisation is needed for transmitting to other stakeholders).

Article 11 of the Criminal Procedure Code states that "except in the cases where the law has provided it otherwise and without prejudice rights of the defense, the procedure during the investigation and during the instruction is secret". The rights of communication to the administrations must be stated thus legally, what is in particular the case to allow the application of administrative penalties.

A procedure classified without continuation (suite) is not any more subjected to this obligation of secrecy, but the article R 156 of the code of criminal procedure brings limitations to its communication: " in criminal or police matters, no delivery other than that of decisions, definitive penal judgments prescriptions and writs of execution can be delivered to a third party without an authorization of public prosecutor or general prosecutor, as the case may be, in particular as regards the parts of an investigation ended with a decision of classification without continuation (suite)".

As a general principle for all matters and issues, Labour Inspectors needs the authorisation /permission of the Public Prosecutor in order to communicate their reports, findings or even penal reports (Pro justitia) to other public authorities.

There is only one exception: when it concerns findings about illegal work they can transmit their findings and communicate them freely without needing such a prior permission. In other cases it is similarly possible when it is foreseen by the legislation.

On the other hand, Article of Law L1263-1 of the Labour Code provides the Labour Inspectors' right to communicate information and documents to Labour Inspectors with similar powers of foreign states and the authorities responsible for coordination of their actions with those states. This article is the transposition of Article 4 of Directive 96/71/EC, which provides mechanisms for cooperation and information.

A decree of the State Council provides the nature and conditions of these communications and the personal data protection.

SECTION 3 “MUTUAL ASSISTANCE IN INVESTIGATION OF BREACHES”

Mutual Assistance at European level

The legal basis for mutual assistance at European level is Article 4 of the Directive 96/71/EC and article L 1263-1, R 1263-10, R 1263-11 and L 8271-6 of the French Labour Code. As article 4 of the Directive states “such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities”.

For this purpose, it has been set up in France a National Liaison Office («Bureau de Liaison National»-(B.L.N.-), at the General Direction of Labour (DGT) whose main tasks are the diffusion of applicable legislation, providing legal assistance to inspection services and exchange information on investigation processes.

It has been set up other liaison offices (« Bureaux Liaison Déconcentrés» -B.L.D.-) for exchanging information with countries who have signed bilateral agreements with France such as Germany, Belgium (with two B.L.D. in “Alsace” and “Nord-Pas-de-Calais”) and Spain (a “Declaration d’Intention” Franco-Spanish with two B.L.D. in Aquitaine and Languedoc-Roussillon).

We have to add the intergovernmental agreements (subject to parliamentary ratification) with the Netherlands and Bulgaria. Currently new agreements are under negotiation, based on the Spanish model (it seems to be the most appropriate, since there is no need of a parliamentary ratification) with Luxembourg (B.L.D. Lorraine) and Italy (B.L.D. Paca and Rhône-Alpes).

All the officials of the French labour inspectorate can request to liaison office for exchange information in duly motivated cases where there a suspicion of fraud on the occasion of an inspection action and they cannot request directly for information to similar officials from other MS. Formal models are used and fixed terms to evacuate answers had been set.

The value of evidences collected abroad

The French criminal law is characterized by the principle of freedom of evidence. Article 427 of the Criminal Procedure Code states that the infringements can be established by all means of evidence and the judge will decide according to his or her conviction.

Therefore the French penal system is based on the principle of freedom of evidence. The penal judge has the utmost sovereign competence to validate and to weigh the value of evidences. Evidence gathered from abroad, if obtained in a legal way, can be used for a penal proceeding in France.

Convention on Mutual Assistance in Criminal Matters

The Convention is applicable in France, just like the Convention of 20 April 1959. Both instruments are considered to be useful for judicial investigations and to boost penal prosecution, but they don't concern the assistance for execution financial penalties abroad.

It doesn't seem to exist bilateral agreements in this regard.

SECTION 4 INTERNAL PUNISHMENT PROCEDURES

Labour Inspectors can initiate enforcement procedures when breaches are checked through an improvement notice ("mise en demeure") and infringement notice (procès verbal).

Administrative proceedings

Nearly all infringements on social law are punishable with penal sanctions (mostly fines). Only exceptionally in a couple of matters an "administrative fine" is possible (for some regulations concerning Social security, or some safety and health regulations) and also in case of "illegal work" by a foreign worker (e.g. no work permits). In these cases an administrative fine can be imposed for being to be paid to a public body independently of the result of a penal prosecution.

French Labour Inspectors have not competences to initiate administrative punishment procedures in those cases but they can communicate their findings to the competent authorities in order to raise administrative sanctions on other matters such as illegal work cases. These administrative sanctions go in increase.

Labour Inspectorate decisions

The actions of the French Labour Inspectors in enforcement procedures can be the following:

- **Observation**, which is an advice or recommendation on the best way of applying the regulation or carrying out a particular activity,
- **Improvement Notice (mise en demeure)** is a demand to the employer that in a certain term he should fulfil and apply the legislation. Inspectors are forced to use this instrument before initiating a judicial procedure. The measure is capable of being contested to the Regional Director, which does not put it in abeyance, it could be claimed before the Regional Director of Labour – who put it in abeyance-, it can be appealed before the Secretary of Labour – which does not put in abeyance either - and it can contested to the Administrative Court.

The observations and requirements notified by the Labour Inspectorate on Occupational Health and Safety must remain in the term of 5 years at the disposal of later visits, both of inspectors and of controllers.

Such documentation must be communicated by the employer to the safety and health committee, to the union representatives and to the representatives of certain specialized agencies (l'OPPBT, Prévention du Bâtiment's Organisme Professionnel et des Travaux Publics, CRAM, caisse régionale d'assurance maladie).

- **Improvement Notice in a general breach of an OSH obligation.** It entails a legal breach that generates a dangerous situation that can jeopardise the workers' safety. In this Notice the term is decided by the Regional Director based on a report of the Labour Inspector.

The regime of administrative reviews is the same than the previous case.

- **The urgency procedure** is activated in case of serious and imminent risk for breaches on OSH. The inspector should address to the judge in order to adopt urgent measures to stop works. This decision is immediately executive.

This procedure is used in very special cases - approximately 40 in a year-. In this procedure the inspector becomes an agent of the process and the High Court adopts the decision of stoppage.

- Suspension arranged by the inspector with immediate effect in construction sites with an imminent risk of fall or burial.
- **Infringement Notice (Procès Verbal):** it constitutes the first step of the judicial actions initiated against an employer or his representative when an infraction against the legislation on OSH or working conditions is committed.

Received the record, it operates the public accusation, who can direct the procedure across a double compatible route, that is to say, the penal one to punish the culprit and civilian to repair the possible caused hurts.

Appreciation powers of inspectors

The inspector has the right to choose the most appropriate actions as a reaction on the found infringements, like giving a warning (observations), imposing a deadline, making up a penal report to the public prosecutor etc.)

The French inspectors have very important powers. Inspectors gave 850.000 warnings-observations in 2008 and 910 000 in 2009. Before 2006, the local Labour Inspection units are independent in the choices of their appreciation power.

Penal proceedings

As a general rule, penal prosecution is the result of a penal report ("Pro justitia"). It must be sent to the Public Prosecutor. In other words, the most common reaction to infringements is to try to generate penal prosecution.

The Conviction is made by a penal court. Sanctions mostly have a penal nature. There's only one domain of infringements where a copy of the penal report must be sent to the offender: in case of labour time issues.

When Labour Inspectors exercise the missions foreseen in article L 8112-1 of the Labour Code, which authorizes them to notice infringements, they have certain powers of judicial police: free entrance in premises, right to obtain communications and documents, etc.

Labour Inspectors are not considered as parties in the penal process. During the criminal investigation, they can be sought to supply an opinion, or be required as persons qualified on the ground of articles 60, 77-1, 151 and 152 of the code of criminal procedure. In the process they can be heard as simple witness. The presence of the Inspector who has reported an offence in the penal process is not compulsory and its opportunity can be evaluated by the judge according to the facts.

For what it refers to the penal procedure derived from offences on OSH, this can finish by a judgment (which can be contested) that can determine the absolution, to impose a fine and privation of freedom (the fine can multiply depending on the number of workers or the size of the company). The guilty subject can be a natural or a legal person.

In the penal procedure, it is the public prosecutor the responsible to execute sanctions but, immediately after the modification produced in the Penal Code (articles 48-6 to 48-36). Pursuant to the Decree of May 3, 2007, he also execute sanctions imposed on a natural or legal person by an authority of another member state of the European Union, in the frame of the Decision of the Advice of February 24, 2005.

It refers both to the pecuniary sanction and to the possible indemnification of civil character or to the judicial fees.

In the same manner, the public prosecutor is the responsible of transmitting the sanctioning process finished in France when the guilty subject is a natural or legal person who takes roots in another country of the European Union.

The number of Penal reports has been 33.000 between 2004 an 2009. Nearly 1/3th of them are penal reports concerning the infringements of illegal work/hidden or dissimulated work (“travail dissimulé”).

With regard to infringements concerning posted workers, 100 penal reports have been drawn up (in 2010) for non-respect of the prior declaration by foreign employers (only a relatively light sanction of 5th category – 150 euro), but most infringements are found in penal reports concerning more serious infractions like safety and health, those are hidden in the mass of statistics.

A typical situation of breach by companies who post workers in France (travail dissimulé) is the following one: the prior declaration not having been done to the local labour inspectorate, not having indicated a responsible person spokesman on behalf of the employer and not having declared a labour accident to the LI.

Infringements concerning posted workers seldom lead to conviction by the penal court. Sometimes the nature of those infringements are transformed in “travail dissimulé” (hidden work) in case of abuse of the status of posted workers (illegitimate use of this status). For example, when it is a proven fact that the posted workers were hired directly by the French employer (client or end user) in which case the posting is false and simulated. In case of “travail dissimulé” an administrative fine is also possible, it can even be combined with a proceeding of penal prosecution.

The general policy concerning penal prosecution in France is streamlined by instructions of the Minister of Justice addressed to the General Public Prosecutors (Attorneys general). In March 2002 a joint instruction (circulaire) was given by both the Minister of Justice and the Minister of Labour. It aimed at all public authorities with competence in the field of combating illegal work. It asked them to cooperate as much as possible, to instruct and explain each others methods, and their mutual orientations and policy. Taking into account the development of LI regions towards more autonomy since 2009, the regional

directors should set up regular contacts and consultation with the general Attorney of their region.

Most of the infringements on labour regulation are considered as an offence of second degree, less important than crimes (third degree) but more important than the lighter kind of contraventions (first degree).

For social (labour regulation) infringements and their public prosecution, only the District Attorney (public Prosecutor officer) is competent. There are no specialised labour prosecutors.

“Immediate collection” is possible for some infringements, a fixed fine can be paid, in which case prosecution will stop.

On the basis of the Code of Criminal proceeding, an alternative for penal prosecution is a regularization, which means that the Public Prosecutor can choose to propose to the offender to regularize the situation and if that proposal is executed, and as a trading in, no prosecution can take place anymore.

In France, the Public Prosecutor often asks the Police forces to perform additional enquiries after inspections carried out by the LI (ex a hearing of the offender). The outcome of such enquiries is often sent to the LI of advice... Labour Inspectors don't take enough notice and attention to these reports. They somewhat miss the opportunities to interact with their stakeholders.

Labour inspectors competences in civil affairs

French Labour inspectors also have a good and special relationship with the judges in the civil courts (“le Conseil de Prud'hommes”). they can intervene in some civil court cases:

- some competences in case of dismissal
- addressing a request to the President of the tribunal for closing down the works in cases of very serious danger in safety & health issues.

The principle of territoriality

The competence to pursuit an offence committed in another country is regulated in Article 113-7 of the penal code. In case of crime it is always possible but in case of “delits” (no contraventions, nor crimes) –which cover most of the labour law offences- they can be prosecuted on the condition that the offence is also punishable in the country where it was committed.

On the other hand, an offence committed in France can be judged and convicted at any case.

La juridiction pénal prévoit des sanctions pouvant aller jusqu'à 3 ans d'emprisonnement et 45000€ d'amende pour le travail dissimulé (L8224-1 du code du travail).

Par exemple, sur environ 4 000 infractions concernant le travail dissimulé, 68% sont des amendes fermes pour un montant moyen de 1100€ (dissimulation de tout ou partie de l'effectif salarié, sur tout ou partie du temps de travail, recours à des faux statuts (stagiaires, indépendants, auto-entrepreneurs) (cf source statistique de la justice française, 2009).

SECTION 5: MUTUAL ASSISTANCE AND MUTUAL RECOGNITION IN FINANCIAL PENALTIES

The Framework Decision 2005/214

France has adopted a law transposing the Framework Decision (2005/2014/JHA). French penal code allows the prosecution of offences outside its territory (Article 113-6). It is applicable to French if the offence is also punishable by the law of the country where it has been committed.

The concerned persons are to be informed about the proceeding. There are special regulations to summon someone, proceeding or conviction is only possible when the person or the company returns to their country of origin.

The Framework Decision has been adopted recently. As a consequence there are no records of cases in which the Labour Inspectorates or other competent authorities had attempted to enforce fines in another Member State nor have Member States tried to enforce a fine in France.

Questions with focus on special treaties or agreements with Member States concerning enforcement of health and safety could not be properly answered. There were several conventions mentioned that should cover the cross-border prosecution of those matters.

However, the FWD 2005/214/JHA is considered to be applicable to Labour Inspectorate's enforcement procedures in working condition matters. In relation to Article 2 FWD the public prosecutor is competent for the transmission of fines. The local or regional prosecutor (domicile of the convict) is the competent authority for the reception of fines committed in another Member State. French authorities do not receipt any requesting forms from other Member States which are not translated in French.

With regard to the question if OSH fines from other Member States could be enforced by the French law transposing the FWD, the criteria of applicability is not of material but of formal nature. Administrative fines (i.e. infringement against OSH regulations of civil nature) are not covered by the French adoption of FWD. Only when the fines are imposed by a court or they are administrative decisions which can be appealed to a penal court the FWD is applicable in France.

The list of infringements for which France cannot refuse the execution of requests, corresponds mainly to the list foreseen in article 5 of the FD (where the double criminality must not be verified).

No central authority has been designated in France.

The Public Prosecutors (Attorneys-general, District Attorney, substitutes,) all have full competence for handling all requests within their territorial area.

Due to the fact that the application of the request has been decentralised, the central administration has no statistics concerning:

- the number of financial penalties issued by the competent French authorities
- nor the types of offences for which financial penalties are issued to another Member state
- nor the number of financial penalties recognised and executed in France
- nor the number of cases where this execution has been refused by the French authorities

As the Framework Decision has been adopted recently, as a consequence there are no records of cases, the Labour Inspectorates or other competent authorities had attempted to enforce fines in another Member State nor have Member States tried to enforce a fine in France.

As for the certificates, France only accepts requests made up in French language.

REPORT CONCLUSIONS

It is important to continue efforts to combat labour fraud in the posting of workers, which has led in the establishment of certain measures and consideration of others additional as follows:

In 2008 a “National Delegation” to combat illegal employment at an inter-ministerial level has been established, (in addition, it has succeeded another inter national structure, the inter-ministerial delegation to fight against illegal work, created in 1997) and a “General Directory” containing all procedures related to the posting of workers has been published. General Directives in the fight against various forms of illegal work are disseminated regularly to government services and public prosecutors, and have been for many years.

- An amendment to current Regulation is under consideration about data requirements.
- Fight against undeclared work and fraud requires a great cooperation, collaboration and data exchange effort, nationally and internationally.
- To avoid problems caused by the lack of knowledge about bilateral agreements, at certain “territorial units” or of certain control agents, special information leaflets have been distributed throughout the territory.
- And above all, however, it is necessary to improve data bases. These databases can help to control many aspects of the reality and the accomplishment of all requirements of posting of workers. This could be done adding to the data being included in the databases for the annual surveys, others data that are currently not included (e.g. adding the workers’ name to verify the temporality of the posting).

4. REPORT ON AUSTRIA

SECTION 1. INFORMATION AND STATISTICS ON POSTING OF WORKERS AND PROVISION OF SERVICES IN AUSTRIA

Reporting obligation for posting companies

Foreign employers have to report to the Central Coordination Office for the Control of Illegal Employment the employment of workers who will be posted to Austria to perform continued work and hand over a copy of the report to the representative assigned by the employer.

The term “representative” means a person authorised to instruct the posted worker on behalf of the employer or - if only one worker is posted - this particular worker.

This has to be done one week before the start of the work at the latest. In the case of catastrophes, work which cannot be postponed and jobs which have to be completed at short notice, the report has to be made immediately before the work commences. If the employer has not handed over a copy of the report to the representative prior to commencement of work, the representative has to file the report immediately upon commencement of work.

The report has to include the following details:

- name and address of the employer.
- name of the person authorised to instruct the posted worker on behalf of the employer
- name and address of the client in Austria (general contractor)
- the names, dates of birth, social insurance numbers and citizenship of the employees posted to Austria
- start and expected duration of their employment in Austria
- amount of remuneration due to the individual workers
- place of employment in Austria (also other places of work in Austria)
- the type of work and how the employees are to be used
- if an official permit is required for the employment of the posted workers in the state in which the employer is established, the name of the issuing authority and the reference number, the date of issue and the period of validity or a copy of the permit
- if the posted workers require a residence permit in the state in which the employer is established, the name of the issuing authority and the reference number, the date of issue and the period of validity or a copy of the permit

The report (so called "Meldung pursuant to § 7b AVRAG) can be downloaded from the homepage of the Ministry of Finance: https://www.bmf.gv.at/Service/Anwend/FormDB/show_mast.asp - search term KIAB 3-E or on <http://www.ams.at/> and it should be accompanied by an A 1 form (formerly E 101 form) which proves to the authorities of Austria that the posted worker is covered by social insurance. The Central Coordination Office for the Control of Illegal Employment passes a copy of the report on to the competent health insurance institution and to the Public Employment Service.

Most common breaches of posted companies

Employers or the persons authorised to instruct the posted worker on behalf of the employer or –if only one worker is posted– this worker who do not submit the report to the authorities on time or who do not keep the required documents available for inspection commit an offence under administrative law and shall be fined by the District Administration Authority to pay from € 500 to € 5,000.-- (or in case of recurrence from € 1,000.-- to €10,000.--).

The tax administration launched a demand for administrative penalties in 2010 in 1.214 cases.

An employer who employs a worker without paying him/her at least the basic remuneration laid down by law, by decree or by collective agreement commits an offence under administrative law and shall be fined by the District Administration Authority to pay for each worker from € 1,000.-- to € 10,000.-- (in case of recurrence from € 2,000 to € 20,000.--). If more than three workers are affected, for each worker € 2,000.—to € 20,000.—(in case of recurrence € 4,000 to € 50,000.--).

If the difference between the remuneration actually paid and the basic remuneration laid down by law, by decree or by collective agreement is small or if the employer's default is low no fine will be imposed.

Obligation to keep documents ready

Alongside the obligation to keep a copy of the report, the employer or his/her representative has to keep documents about the registration of the workers for social insurance (social insurance document A-1 if the posted workers are not subject to compulsory social insurance in Austria).

The employer or his/her representative also has to keep documents in German at the place of employment, which are necessary to allow the monitoring of the remuneration due to the Austrian regulations (wage or salary documents - Lohnunterlagen). In case of temporary agency work or workers otherwise hired out this obligation applies to the user undertaking. In this case the temporary-work agency or the company hiring out workers has to provide these documents to the user undertaking.

Transitional arrangements for new EU Member States after EU enlargement

In the case of postings from the new EU Member States (with the exception of Malta and Cyprus), the transitional arrangements should be noted:

In cases where the posted workers are nationals of a new EU-member state or a third country, that notification has to be also accompanied by sufficient evidence that the workers are legally resident and employed in the country of origin for a period going beyond their temporary performance in Austria. If the requirements are fulfilled, the Public Employment Service sends a confirmation to the company.

These transitional arrangements will only be applicable to nationals of the new member states Romania and Bulgaria as of 1 May 2011 (until 31 December 2013).

Permissibility for self-employed workers

Carrying out activities within the framework of regulated trades or businesses according to Section 94 of the 1994 Industrial Code (GewO 1994) by workers posted across borders is conditional on the foreign company in their home country being authorised to exercise this trade, if the activity is regulated in their home country, and, if the activity is not regulated in their home country, having exercised the activity for at least two years or having completed successfully the relevant trade training.

The cross border activity has to be reported by the entrepreneur in advance and in writing to the Federal Ministry of Economy, Family and Youth according to Section 373a Paragraph 4 of the 1994 Industrial Code (GewO 1994). In case of certain trades or businesses which are mentioned in Section 373a Para. 5 No. 2 of the 1994 Industrial Code (GewO 1994) the activity may not be commenced unless the respective official note by the Federal Ministry of Economy, Family and Youth has been received.

Data Base Information

The posting of workers has to be notified to the Central Coordination Office of the Federal Ministry of Finance. Therefore the tax administration has a database with all notifications of posting of workers. Access is provided for the tax administration and labour inspectorate. LIA has access to this data [§ 20 (7) Arbeitsinspektionsgesetz 1993-ArbIG.

Posting statistics

The amount of posting in the last years is listed below. It only includes data about the posting companies but not the number of posted workers

YEAR	NUMBER OF ANNOUNCEMENTS OF POSTINGS
2010	12.129
2009	12.061
2008	10.570
2007	5.204

The main sectors affected are construction and Information & Technology (IT)

SECTION 2. LABOUR INSPECTION POWERS TO INVESTIGATE BREACHES

Labour Inspectorate's competences

The Labour Inspection is the competent authority to enforce legislation on safety and health at work no matter if the employees are legal or illegal employed.

For certain groups of employees, special inspection authorities with similar duties as the Labour Inspection exist like the labour inspectorate for transport and the Labour Inspectorate for agriculture and forestry.

The Austrian Labour Inspection is responsible for the following matters related to Directive 96/71/EC:

- Maximum work periods and minimum rest periods;
- Health, safety and hygiene at work;
- 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;

Other competent bodies on inspection matters

The remaining matters foreseen in the Directive 96/71 (contracts of employment, wages and salaries, vocational training) fall mainly under the responsibility of the Central Coordination Office for the Control of Illegal Employment (KIAB).

The enforcement of social insurance law on work-related accidents and occupational diseases is carried out by the public entity AUVA (Allgemeine Unfallversicherungsanstalt). Posted companies are legally required to communicate work-related accidents and occupational diseases to the AUVA.

Investigation powers of Labour Inspectorate

- To visit workplaces without a prior notice.
- To summon company representatives or other persons in your office, as it is generally possible for public authorities.
- The LIA is entitled to ask for information from manufacturers and producers of work materials, machines and devices as well as parts thereof.
- LIA can request copies of inspection reports, surveillance reports and documentation of certification proceedings from accredited authorities.

It is not possible for Labour Inspectors to obtain information about companies from private stakeholders.

Upon the initial detection of a violation of occupational safety and health regulations LIAs will send an informal letter to the employer in which a deadline for correction is set. If the employer does not comply or if the violation is severe it will be reported to the administrative penal public authority. LIAs also have to request for an exact fine rate.

Collaboration with other public bodies

On a regular basis, information is given by:

- The trade administration (reconstruction/modification of industrial plants)
- The police (fatal/severe occupational accidents)
- Personal accident insurance agencies (occupational accidents and occupational disease).
- Furthermore, information can be obtained through administrative aid from other public authorities or health insurance agencies, if they are well-founded and not contradictory to the data protection act (Datenschutzgesetz – DSG).

Cooperation and exchange of information is a basic necessity uncovering infringement of law. Austria is a precursor in E-Government and has implemented many services for cooperation of different authorities, access to register and seamless e-Government applications.

The control units of the different authorities make joint operations. Informal meetings on different levels exist to inform about cases to plan and coordinate joint operations. There exist common audit of taxation and social security contributions with exchange of the results of the audits.

Joint working teams for investigations are possible with the social insurance institutions and with the controlling body of illegally employed foreign workers as well as with the regulatory authorities.

Data Protection during the investigation

Different Acts oblige the authorities to cooperate, support each other and exchange information, e.g. access to data from social insurance for control units, information about results of controls to authorities responsible for working permissions and unemployment benefits. Electronically data exchange has additionally to be in accordance with the Act of Data Protection.

Data exchange has no severe restrictions that would interfere to cooperate according to the different Acts, enabling the authorities to use and exchange data. There must be a special clause in the law who is entitled to see which data.

Cooperation between different controlling units is mostly using the data of other bodies; as there exists a wide range of access to registers, few request for information is necessary.

Personal data in the files of LIA fall, in principle, under the Federal Act concerning the Protection of Personal Data (Datenschutzgesetz 2000). For that reason the LIA has to notify it basically to the Data Protection Commission (Datenschutzkommission). Each LIA itself is responsible for the compliance with the data protection act.

LIA has to notify the automatic processing of personal data to the Data Protection Authority in Austria.

LIA has to register automated procedures in the processing of personal data. In the Austrian Federal Act concerning the Protection of Personal Data the appointment of an operational personal data protection official is not foreseen. Although there is no obligation to appoint an operational personal data protection official it is common for larger enterprises to entrust a person with data protection issues.

According to the Federal Act concerning the Protection of Personal Data also legal persons are covered.

The transmission of personal data by LIA without the subject's consent is acceptable, if there is reasonable suspicion of certain regulations being violated (trade law, social welfare law, environmental law, etc.) or the knowledge of data about dangerous substances [§ 20 (4) and (5) ArbZG].

Due to § 8 paragraph 4 the use of data concerning acts and omissions punishable by the courts or administrative authorities, and in particular concerning suspected criminal offences, as well as data concerning criminal convictions and preventive measures does not without prejudice to paragraph 2 infringe interests in secrecy deserving protection if:

1. An explicit legal obligation or authorisation to use the data exists; or
2. The use of such data is an essential requirement for a controller of the public sector to exercise a legally assigned function.

3. The legitimacy of the data application [Datenanwendung] otherwise follows from statutory responsibilities or other legitimate interests of the controller that override the data subjects' interests in secrecy deserving protection and the manner of use safeguards the interests of the data subject according to this Federal Act [Bundesgesetz].or
4. The transmitting of data is made for a report to an institution in charge of prosecution of a reported criminal act (or criminal omission).

The law provide for specific controls by the Data Protection Authority. Section 17 paragraph 1 DSG 2000 imposes an obligation to notify to the Data Protection Commission [Datenschutzkommission] for the purpose of registration in the Data Processing Register [Datenverarbeitungsregister]. The duty to notify also applies to all circumstances that subsequently lead to the incorrectness or incompleteness of a former notification.

Data applications are not subject to notification if the data application contains solely published data (such as information made public by a company); or concerns the management of registers and catalogues that are by law open to access by the public; or contains only indirectly personal data (a special case where the identity of the data subject is not known to this particular controller, but the person is not really anonymous); or is carried out by natural persons for entirely personal reasons or concerns just the person's family life; or is carried out for journalistic purposes.

If a large number of data controllers [Auftraggeber] carry out the same data applications in a similar fashion which, due to the purpose of the use and the processed categories of data, is unlikely to be a risk to the data subjects' interest in secrecy, these applications can be declared Standard Applications [Standardanwendungen]. These are not subject to notification either. The current Standard Applications [Standardanwendungen] can be found in the Standard- und Muster-Verordnung 2004 (StMV 2004), Federal Law Gazette II No. 312/2004.

Certain data applications concerning state security and crime prevention are also exempt from the duty to notify. All the exceptions are regulated in section 17 paragraph 2 and 3 DSG 2000.

SECTION 4. MUTUAL ASSISTANCE IN INVESTIGATION OF BREACHES

Real experiences on cross-border collaboration and mutual assistance

The Austrian tax administration launched one request for information to the Polish labour inspectorate in case of the suspense of wage dumping. In this case cooperation worked wonderfully, the information provided was helpful.

The other way the Austrian tax administration received a request from the Czech Republic that led to deep investigations and may result in court procedure.

There are not particular experiences on occupational health and safety matters except some specific communications in exceptional cases.

Easy exchange of information in an electronic way would be helpful. Problems occur with different legislation regarding sanctions. Restrictions occur when administrative procedures and judicial proceedings coincide.

Transmission of enforcement information on OSH to other Countries

Seldom, in individual cases – if necessary - the competent SLIC Member is contacted and asked to provide the required information.

- In relation to the evidences gathered in the inspection proceeding (physical evidence, samples, documentary evidence, statements, confessions, etc.), evidences from abroad are generally admissible to administrative trial procedures. In administrative procedures the principle of unrestricted evidence applies. A precondition for the admission of witnesses is their doubtless identity.
- Transmission of data in case of mutual assistance or by spontaneous information must be based on national law and done by the authorized body.
- In case of posting the exchange of information is based upon Directive 96/71 and the Austrian Labour Contract Law (AVRAG) in connection with the Data Protection Act. The exchange of data must be processed by the national liaison offices. The use and amount of data to be processed must not be extended to other subjects than mentioned in the regulations for this concrete case, e.g. it is not allowed to process data about taxes in mutual assistance regarding the posting of workers.

KSS is being used for transmission of information not related to personal data.

Bilateral Agreement with Germany

There is a bilateral agreement between Austria and Germany on mutual assistance in administrative matters. This bilateral agreement simplifies the Convention procedures.

The convention is legally binding and equivalent to legal rules. It foresees ways of sending procedural documents concerning administrative criminal procedures and in proceedings in Austrian courts within the system of administrative tribunals.

- a) They can be sent by mail (rules about mailing circulation between the contracting states apply).
- b) If a confirmation about the delivery needed, the document is to be sent by registered mail.
- c) If the document can't be sent by mail or is this not practicable, the responsible authority in the other contracting state is requested to deliver the mailing by means of administrative and legal aid.

It also foresees procedures of request for mutual assistance through:

- a) investigations including taking evidence
- b) hearing of participants and interrogation of accused/aggrieved party
- c) disclosing information including information from the register of conviction
- d) transmission of documents

The contracting states also afford mutual assistance by disclosing information and transmitting documents from judicial criminal procedures and summary proceedings concerning administrative penalties.

It does not foresee spontaneous exchange of information, special hearing procedures for witnesses, nor joint investigation teams in specific cases.

The Convention foresees specific rules for data protection. Information and documents that are transmitted from the requested body are liable to the domestic regulations about official secrecy of the other contracting state. If the requested state communicates that the transmitted information or documents may not be passed on or only passed on for certain reasons or only used during a certain time period than the requested body has to respect these restrictions.

Convention of 29 May 2000 on Criminal Matters

The convention of 29 May 2000 on Criminal Matters is basically applicable to procedures on violation of occupational safety and health regulations.

It is considered that the convention of 29 May 2000 on Criminal Matters is applicable to LIA punishment procedures although they have administrative nature and their resolutions can only be appealed to independent courts specialized in administrative matters.

Austria has ratified the convention of 29 May 2000. There are no additional protocols that could affect mutual assistance concerning OSH sanctions. Austria has not adopted an Act implementing the convention.

According to the statement provided for in article 24 of the Convention the list of authority or authorities that are competent for the purposes of articles 3 (1) and 6 (1, 2 and 6) of the Convention will be available under <http://www.bundeskanzleramt.at/site/6671/default.aspx> soon.

In relation to transmission of requests for mutual assistance (article 6 (6) there are no special conditions stated, and in relation to spontaneous exchange of information (article 7) there are also no conditions imposed.

SECTION 5. INTERNAL PUNISHMENT PROCEDURES

Labour Inspectorate role in the prosecution of breaches

Upon the initial detection of a violation of occupational safety and health regulations LIAs will send an informal letter to the employer in which a deadline for correction is set. If the employer does not comply or if the violation is severe it will be reported to the administrative penal public authority of the province or district.

LIAs also have to request for an exact fine rate. The LIA is party in the following administrative proceeding meaning that it has the right to appeal, if the reported violation is not treated accordingly by the administrative penal public Authority.

The Federal Minister of Labour, Social Affairs and Consumer Protection has the right to complain to the independent court for administration matters against a decision of the second instance.

Administrative fines and penalties following conviction be imposed only on individuals, and the administrative responsibility lay only with the employer or also his representatives (proxy, controller, manager).

The employers are generally responsible. Other people, but only executive employees, can explicitly be appointed as a responsible person for occupational safety and health (§ 9 Verwaltungsstrafgesetz 1991 - VStG).

The employers are generally responsible. Other people, but only executive employees, can explicitly be appointed as a responsible person for occupational safety and health (§ 9 Verwaltungsstrafgesetz 1991 - VStG).

There are no cases of joint liability between employer (or controller, manager, etc) and the corporation for which they work when it is about an OSH offence. The national legislation does not foresee the **joint liability of the national contractors** in case of infringement committed by posting companies or workers.

In case of violations of technical and industrial hygienic occupational safety and health regulations, the amounts of fines are between € 145 and € 14.530. LIA or competent authorities can't impose sanctions to Public Administration.

The competent authority for enforcing or executing the fine in case this is not paid by the employer are the public authorities in the districts [§ 1 (1) in combination with § 3 (3) Verwaltungsvollstreckungsgesetz - VVG].

It is considered that the Directive 2010/24/EU, which has not been yet transposed, is not applicable to enforcement of these administrative fines.

The principle of territoriality

If a person who is based in Austria commits an offence in another country that offence can't be tried in Austria, but if a foreign person commits an offence in Austria that person can be judged and convicted in Austria.

In case of accident at work of a national worker abroad, the national worker remains in the Austrian Social insurance System and still insured.

In the Austrian Insurance System it makes no difference if the employer is prosecuted or not the costs are taken over anyway. The AUVA (Allgemeine Unfallversicherungsanstalt - the Austrian Workers' Compensation Board) is the Austrian social insurance for occupational risks for more than 3 million employed persons and 1.3 million school children and students.

SECTION 6. MUTUAL ASSISTANCE AND MUTUAL RECOGNITION IN FINANCIAL PENALTIES

The Council FWD 2005/214/JHA

The Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, has been transposed to the national law (EU-Verwaltungsstrafvollstreckungsgesetz BGBl. I Nr. 3/2008).

It is considered that the FWD 2005/214/JHA is applicable to LIA enforcement procedures because in Austrian administrative penal proceedings levels of review exist to an independent administrative tribunal (status of a court). According to the law transposing the FWD, OSH fines from other MS can be enforced.

In relation to article 2 of FWD 2005/214/JHA, a list of the authority or authorities that are competent as both issuing and executing State will be available soon at:
<http://www.bundeskanzleramt.at/site/6671/default.aspx>.

The competent authority does not accept the standard form certificate requesting execution in EU official languages other than national language. The national law lay

down that the person concerned has to be always personally informed of the proceeding and he has right to contest the case or, at least, it is necessary that he appears personally in the legal proceeding.

There are no records of cases in which LIA or the competent authority for imposing sanctions has attempted to enforce a fine in another Member States according to the FWD 2005/214/JHA because these sanctions have been always paid. There are neither records of cases in which Austrian authorities have been requested to enforce a sanction from another Member State.

Bilateral agreements

There is a bilateral agreement with Germany on mutual assistance in administrative matters, in order to applicable, simplifying and facilitating the Framework Decision procedures.

6.- REPORT ON GERMANY

SECTION 1. INFORMATION AND STATISTICS ON POSTING OF WORKERS AND PROVISION OF SERVICES

Sources of legislation – a unique and typical German situation

In Germany, the Federal Government is responsible for making laws on labour protection and the 16 Länder are responsible for enforcing the Acts and Ordinances. This is also the case for most aspects of the legislation concerning cross border labour issues.

Posting Directive 96/71/EC

Germany implemented the Directive 96/71 EC concerning the Posting of Workers in the Framework of the Provision of Service in its national law on February 26, 1996 (AEntG) which was replaced on April 24, 2009 by the Posting of Workers Act.

The act requires employers with their base in Germany, employers with their base abroad (including contractors operating on the basis of bilateral agreements) as well as Hirers-Out and Hirers to comply with:

- legally required working conditions (OSH included).
- in certain industries, employers and hirers-out are obliged to grant certain working conditions laid down in collective wage agreements.

Any violation of the Posting of Workers Act (AEntG) may constitute an administrative offence punishable by an administrative fine.

Statistics on posting workers

The most import authority (The Customs, “FKS”) monitoring this directive 96/71/EC, does not have an in-deep database of all movements of posted workers , so keeping statistical records on the posting of workers is rather limited and mostly related to enquiries, moreover there is no obligation to have a legal representative in Germany.

There is an **exception** if there is a minimum wage for a limited number of sectors applicable. In this case, the posting company has to indicate in its written information to the German authorities the name of a person, who is **responsible** for the service and also is **authorized to receive official letters** on behalf of the employer, and the German address of this person, in order to make possible the official letters delivery (§ 18 sec. 1 Posting of workers Act).

The Act obliges employers of those limited number of branches, with registered office abroad to adhere to certain work standards set out in German legal and administrative statutes, which have to be complied with also by German employers.

After the SOKA-BAU (The construction industry social funds) was made responsible by law for the leave entitlement procedure for posted construction workers this body now provides valuable data with ‘numbers of postings’ from the ‘old’ and the ‘new’ Member States (SOKA-BAU, 1996-2009). The SOKA-BAU figures traced back over the past 14 years reveal that the figure recorded for workers, employers and construction sites is going down, after peaking in 2000 at around 120,000 workers recorded. From the figures over the past 10 years it emerges that the number of postings from neighbouring countries is dominant. It can be said in general that posting from neighbouring countries to the

west and north often last for only a few days, whereas postings from countries such as, for example, Poland often last for a full year. Of all postings recorded from neighbouring countries, 10700, i.e. 72%, were from 'old' Member States in 2009, 9790, i.e. 75%, in 2005 and 21609, i.e. 73%, in 2000. To sum up, just under 75% of posting workers come from just across the 'old' borders: Denmark, Netherlands, Belgium, Luxembourg, France and Austria.

From neighbouring EU countries 15,443 postings were recorded in 2009; that is 42% of all non-EU/EEA postings, 33277 in 2005, or 43%, and 46275 in 2000, or 50%. To conclude, close on 50% of all the posted workers come from just across the Eastern border.

OSH, minimum working conditions and minimum wages

OSH regulation of the German State and the way the Länder fill it in, is applicable to all foreign employers and their posted workers providing services on the territory.

All employers with their base abroad must, pursuant to § 2 of the AEntG, guarantee to provide the same employment conditions as those laid down in general in *legal and administrative regulations* in Germany, which domestically based employers are consequently also required to comply with. The individual regulations are as follows:

- Minimum wage rates, including overtime rates (in a limited number of sectors),
- Minimum paid annual holiday,
- Maximum working times and minimum rest periods,
- Conditions for the supply of labour, in particular by temporary employment agencies,
- Health, safety and hygiene in the workplace,
- Protective measures in the context of working and employment conditions as they relate to pregnant women, women who have recently given birth, children, and youths,
- Equal treatment of men and women, and other non-discrimination provisions.

The provisions on the payment of a minimum wage represent a major part of the regulations contained in the AEntG.

In accordance with the AEntG, minimum wage agreements laid down in collective agreements are currently only applicable (March 2011) in the following sectors:

- Waste management including street cleaning and winter road maintenance
- (Primary) construction sector
- Roofing trade
- Electrician's trade
- Industrial cleaning sector,
- Painting and decorating trade,
- Laundry services for facility customers

Furthermore, a legal ordinance pursuant § 11 of the AEntG prescribes a minimum wage for the care provision sector.

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Temporary work agencies

Cross-border temporary agency work also exists, but not in the main construction industry, for in this sector temporary agency work is prohibited. The Posting Act stipulates that employment provisions that have been declared generally binding for other sectors must also apply to posted temporary agency workers where the sector concerned is covered by the law. Licenses for temporary work agencies (also from abroad) operational on the German labour market are delivered and controlled by the Federal Agency of Work.

Bogus self-employed

Bogus self-employment is increasingly used as a means of getting around basic labour standards. In these cases the Posting Act does not apply, which opens the door to cutthroat competition; entitlement to minimum terms and conditions of employment and a minimum wage is circumvented.

The trade union IG BAU estimates the number of such cases in construction at over 100,000.

If workers come to Germany as self-employed with an A1/E101 form issued in the home country or with the help of a trade certificate, this form has a binding effect only for the purpose of social insurance, however not as to items of labour law.

Posting of workers declaration:

According to the German posting Act, the Declaration on posting workers is only needed in those sectors, where actually a minimum wage has to be complied with, i.e. in following sectors of the economy:

- *Waste management including street cleaning and winter road maintenance*
- *(Primary) construction sector*
- *Roofing trade*
- *Electrician's trade*
- *Industrial cleaning sector,*
- *Painting and decorating trade,*
- *Laundry services for facility customers*
- *care provision*

It must be notified to the authorities of the **customs administration** at the Federal Finance Office in **Cologne** (unique German Liaison office) specialised department for the financial investigation of illegal work (Bundesfinanzdirektion West - Abteilung Zentrale Facheinheit - also called “**FKS**”) **from which information is sent to local offices**. It includes, among others, data about workers, industry that they are being posted to, duration of employment in Germany. Furthermore, those employers are obliged to record the daily **working hours** and to keep certain **documents** in Germany available. The same applies for companies of the care sector. The place of the assignment or the construction site as well as the place of document administration and employment papers must be notified.

An assurance is to be rendered on the notification form. The purpose is to confirm that the prescribed working conditions are being complied with. The employer must provide a statement at the time of notification certifying that the generally binding collective agreements will be observed.

No database of posting of workers notifications has been implemented, with an exception at the **Building sector in which a database, in reference to holiday's payment, has been set by the "Holiday Found Organization"**.

The absence of the posting notification and the non-payment of minimum wages fixed are administrative offences.

Other obligations for employers

All employers are obliged to assist in the **inspections** by the Department for financial investigation of illegal work (Finanzkontrolle Schwarzarbeit - FKS).

Joint liability of the contractor

In Germany, according to § 14 sec. 1 AEntG, certain clients or contractor are liable for the obligations of their subcontractor with respect to the payment of minimum wages in line with § 8 AEntG and the holiday fund contributions of the construction sector. This is a strict liability regardless of culpability (verschuldensunabhängige Haftung) vis-à-vis the whole chain. Hence, the liability of the main contractor (Generalunternehmer) is extended to all subcontractors. The principal is only liable to the extent of the net wage (§ 14 sentence 2 AEntG). Overtime is also included, in so far as overtime does fall under the employment conditions mentioned in § 5 no. 1 AEntG.

If foreign posted workers are not taxed in Germany, the provider – subcontractor or temporary work agency – may apply for an exemption certificate. If the provider does not apply for an exemption certificate and the recipient – principal contractor or user company – withholds the tax on compensation for construction work, the provider can apply for a tax refund. If an exemption certificate has been submitted, the principal contractor is only liable if it could not trust in the legitimacy of the exemption certificate, because it was obtained by unfair means or false statements and the contractor knew this or did not know it due to gross negligence.

Communications on work-related accidents of posted workers

There is not any obligation for posted companies to notify or communicate.

SECTION 2. LABOUR INSPECTION POWERS TO INVESTIGATE BREACHES

Organisation of the Regulatory and monitoring Authorities in Germany

In Germany the **Federal Ministry of Labour** (in Berlin) is responsible for the legal framework, consultation and implementation of national campaigns. On the level of the monitoring and control, however, multiple authorities are involved in enforcement of labour law.

The organisation of the Labour Inspection activities is divided between the following bodies:

1. **The Labour Protection Inspectorates (Ämter für Arbeitsschutz or Gewerbeaufsichtsämter)** are competent on occupational health and safety (OSH)

in all the German states (Länder). They are also competent in other related matters, like for some limited elements concerning the hard core of the posting directive : inspection on maximum labour time of all workers (posted as well).

These OSH **Labour Inspectorates** of the 16 German States (“Länder”) are in charge of surveillance of occupational health and safety (OSH) in enterprises, subordinated to the related “Länder” Ministry (within the Framework Directive 89/391 and other directives based on Dir. 89/391,) of nationals and posted workers. In case of breaches they have the powers to make an appointment or to stop working. LI have the same powers as police.

2. **“Statutory Accident Insurance Bodies”** (Unfallversicherungsträger) which are branch-related: 9 bodies in the private sector and 21 in the public sector. They are also responsible for the surveillance of enterprises in the framework of preventing accidents and work related diseases (“Dual System”). The inspection system is related to the branches and companies they are in charge of. They carry out inspections just the way like OSH LI do. All employers and employees in Germany must be affiliated to one of these bodies and the regulations also apply on posted workers (foreign accident insurance polis can be taken into account).

They may impose sanctions in case of breaches.

3. The **Ministry of Finance** and its subordinate agencies (FKS **Finanzkontrolle Schwarzarbeit**) are in charge of supervision of Posting Directive (in Germany “Arbeitnehmer-Entsendegesetz”) and illegal work (in Germany: “Schwarzarbeitsbekämpfungsgesetz”).

The FKS has **113 locations of the section fighting illegal work (FKS) – around 6,750 officers** and its competences involves the surveillance on social security systems, checks and investigations in cases of administrative and criminal offences violating social security legislation and the punishment for administrative offences violating social security legislation.

The FKS central department is the Liaison office according to the posting of workers directive, cooperation authority according to the regulation (EC) Nr. 883/2004, central department for Interpol- und Europol- enquiries and registration office according to § 18 posting of workers act (AEntG).

FKS is only competent to conduct inspections in connection with Directive 96/71/ EC in cases relating to the payment of the minimum wage, including overtime pay, holidays, holiday pay, additional holiday benefits and the payment of contributions to a holiday fund and examines whether:

- Foreign employees have the necessary work permits and residence permits.
- Foreign workers are being employed on less favourable terms than Germans.
- Working conditions specified by the Posted Workers Act are being complied.

In the internal market FKS is responsible for combating undeclared work, human trafficking and abuse of social security benefits and illegal work in all its forms. In the future they will also be competent for inspecting the temporary work agencies.

The FKS is authorised to carry out the corresponding investigations. As a part of these investigations, the FKS has the same powers as police law-enforcement authorities. To this extent the customs officials operate as investigating officers of the public prosecutor’s office.

In judicial proceedings, the FKS can take any measures pursuant to the Code of Criminal Procedure (*Strafprozessordnung*) to investigate criminal and administrative offences.

In case of posting of workers, FKS acts in an autonomous way and can impose administrative sanctions for contraventions. In some cases there can be concurrence with criminal offences (undeclared work, social security abuses,...) in which case the penal aspect takes over the lead.

4. (Some) Social partners also playing a specific role in enforcement

In Germany the social partners in the construction industry have established a paritarian fund, ULAK, executed by SOKA-BAU. This institution has special monitoring and enforcement competence. Its function is to ensure that workers receive their holiday entitlements, by collecting contributions from the employers and granting benefits to employers and workers.

In order to check if all construction firms have duly paid contributions, SOKA-BAU has a right of inspection, and this right is frequently utilised. The available documents and findings of checks by the customs administration are used by Soka-Bau for assessing the posting firms in this matter.

Competences of inspection authorities for the issues below are spread:

OSH	LI of the Länder
Working time	LI of the Länder
Wages	FKS
Illegal work – social fraud	FKS
Annual Holidays payment	FKS/Soka-Bau

Labour Inspection Powers (classical and extended investigation powers)

The Inspection bodies can enter to work places without a prior notice, and require information from their representatives, other authorities and private stakeholders, check the identities of the persons working there, question all persons present, examine documents they are carrying, and stop vehicles.

1.1 Statutory provisions that are most helpful for the inspections

Evidence of working time and other documents

Evidence of working time and other specific documents must be submitted to the staff of the FKS, the authority monitoring illegal employment, during an inspection (§ 19 AEntG).

1.2 Keeping evidence of working time

Every employer and every hirer who employs workers has a duty to record the following:

- Start of a worker's daily hours
- End of a worker's daily hours
- Duration of a worker's daily hours

These records must be kept for a minimum of two years as far as they have to allow of the working conditions according to the law on the posting of workers. There is no requirement to keep such records of the working hours if in a certain branch the statutory working condition according to the posting directive is a holiday-related requirement a merely requirement of holidays in a certain branch as mandatory working condition according the law on the posting of workers.

1.3 Keeping documents ready for inspection

Employers with registered offices either in Germany or abroad must ensure the following documents, required for monitoring compliance with the working conditions under the Arbeitnehmer-Entsendegesetz (Posted Workers Act), are kept available in the German language and on German territory:

- **Employment contract** and/or the documents to be issued under home-country legislation transposing "Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the employment contract or relationship" (Proof of Employment Relationship Directive), Official Journal of the European Communities L 288/32 of 18 October 1991
- Evidence of working time,
- Pay slips,
- Evidence of wage payments made.

The four types of document listed above are to be kept available in Germany under all circumstances. Breaches of this rule may be prosecuted as an offence under section 23 of the Arbeitnehmer-Entsendegesetz. If other, additional documents should be required, then these are to be made available for inspection by the monitoring authority without delay.

If the employer intends to invoke an alternative distribution of working time, other documents must be kept available in Germany in addition to the usual documents for inspection which depend of the branch.

At the request of the monitoring authority, the employer must submit these documents at the place of employment, and, in case of construction services, at the construction site.

Mutual Assistance between the different authorities

All the bodies with competences in labour inspection are provided with the obligation to exchange information between the different inspection bodies, carrying out joint visits: OSH LI can build up working teams with the Unfallversicherungsträger and the police, and for illegal work FKS it is foreseen to build up working teams with police, or other Länder authorities and also asking for the cooperation of other public bodies in order to combat illegal work. A co-operation agreement has been signed between the OSH-authorities of the Länder and FKS.

Personal data protection during the investigation

In Germany, the transposition of Directive 95/46/EC was carried out by Federal Data Protection Act adopted in 2001.

As it was said, personal data in LIA's files are used for internal control and monitoring survey of enterprises, without a prior or subsequent control made by Data Protection Authority, (exception made in cases of complaints).

Transmission of this information it is only foreseen to other public bodies with competences in these areas: prosecutor, court, accident insurance bodies, customs, police.

Out of LIA files, Transmission of personal data is allowed if it is done within a task of public interest when it is provided by a statutory provision, with the subject consent or in a subcontracted data processing context.

In Germany the responsible bodies for data protection in the meaning of the Directive 95/46 are:

- a) Federal Data Protection Commissioner
- b) Data protection commissioners of the Länder

That being said, the main customs office, as competent authority for posting of workers inspection is not an "authorised inspector" or "processor" within the meaning of the Data Protection Directive.

If the Labour Inspectorate Authority needs to register automated procedures in the processing of personal data it is compulsory to appoint a responsible person in charge of this processing.

The data protection regulations must also be observed in the context of administrative or criminal proceedings.

The Federal Commissioner for Data Protection and Freedom of Information and the data protection officers of the authorities have a comprehensive right to monitor and check compliance with data protection regulations.

SECTION 3 "MUTUAL ASSISTANCE IN INVESTIGATION OF BREACHES"

Mutual Assistance at European level

There is a fluid exchange of information with neighbouring countries between the competent administrations on OSH Labour Inspection and also it works by requests and sending of information through the "Liaison office".

Experiences on cross-border collaboration and mutual assistances

In Germany the Federal Finance Office West (Operations Directorate) (*Bundesfinanzdirektion West -Abteilung Zentrale Facheinheit*) is competent nationwide for the technical running of the fight against illegal work and illegal employment. It is also the German liaison office pursuant to Article 4 of Directive 96/71/EC. The Federal Finance Office West keeps statistics on the number of cases in which information has been shared with other EU Member States under the Posted Workers Directive. No particular difficulties have been discovered when exchanging of data on the basis of the Posted Workers Directive.

In the field of occupational safety and health no special cases are known.

Transmission of enforcement information on OSH to other countries

In the field of OSH in general exchange of information between German Labour Inspectorates and other countries doesn't exist. The KSS (Knowledge Sharing System) as a communication system for OSH issues between member states is not used yet. In the framework of DIRECTIVE 2006/22/EC on minimum conditions for the implementation of Council Regulations (EEC) No 3820/85 and (EEC) No 3821/85 concerning social legislation relating to road transport activities exchange of information is foreseen.

In relation to the evidences gathered in the inspection proceeding (physical evidence, samples, documentary evidence, statements, confessions, etc.) evidence from abroad is in principle admissible in the German legal system. Information received by the FKS within the framework of international administrative assistance in inspection proceedings can be used later as evidence in judicial proceedings.

For OSH-Labour Inspectorates the communication with Labour Inspectorates of member states is not legally forbidden. Information concerning OSH matters can generally be transmitted by the competent bodies if they are not in conflict with business secrets. In specific cases personal data are required or transmitted in administrative cooperation procedures.

For the FKS the provisions of the Second Chapter of the Tenth Book of the Social Security Code (*Sozialgesetzbuch X*) apply to the discharge of duties under the Act to Combat Illegal Work by the authorities of the customs administration with regard to social data pursuant to § 15 sentence 1 of the Act to Combat Illegal Work. Pursuant to § 15 sentence 2 of the Act to Combat Illegal Work, the tasks arising from the Act in terms of data protection are deemed to be tasks pursuant to the Social Security Code. The obligation to preserve the confidentiality of social data pursuant to § 35 of the First Book of the Social Security Code also applies to the authorities of the customs administration in as much as they perform tasks pursuant to § 2 of the Act to Combat Illegal Work. The law protecting the confidentiality of social data only allows the transfer of social data if statutory authority to transfer the data has been issued pursuant to §§ 68 to 77 or some other legal stipulation in Tenth Book of the Social Security Code (section 67d subsection (1) of the Tenth Book of the Social Security Code). § 77 of the Tenth Book of the Social Security Code regulates the transfer of social data abroad and to supra- and intergovernmental authorities. According to this, a transfer within the EU is permissible if it is necessary to enable the sending or receiving body to perform its duties.

Bilateral agreements with France the Czech Republic and Bulgaria

In order to intensify cross-border cooperation in the fight against illegal work and illegal employment, the Federal Republic of Germany has concluded bilateral cooperation agreements with France, the Czech Republic and Bulgaria that are binding under international law.

These agreements cover in particular forms and levels of the respective cooperation, regulate principles on the mutual exchange of information, name central points of contact, and agree regulations on data protection. On the German side, the Federal Finance Office West has main responsibility for cooperation within the framework of these agreements (because it is the agency with nationwide competence in this regard).

This also covers its function as liaison office pursuant to Article 4 of the Posted Workers Directive.

The cooperation agreements also enable the exchange of information via requests for administrative assistance and the transfer of information in the form of spontaneous exchanges of information. Requests for administrative assistance or spontaneous exchanges of information should be sent in writing, by fax or in electronically encrypted form.

The cooperation agreements are only effective in relation to the inspection proceedings. In judicial proceedings based on a suspicion of a criminal or administrative offence, there is, instead, the option of recourse to judicial and police legal assistance. To this extent it is not possible to hear witnesses or form investigation teams on the basis of cooperation agreements. There are no corresponding cooperation agreements for judicial proceedings.

Records of fines or penalties imposed in the last years to other MS's companies which have not been collected

In the field of OSH there are only few cases of records of fines imposed by Labour inspectorates. Generally Labour inspectorates abstain from pursuit of OSH breaches because, of practical and judicial reasons, the chance of success is estimated very low.

It is highly probable that this situation will change in the future due to the opening of the labour market on 1. May 2011.

For FKS up to now it has been impossible to collect fines if the domicile, the habitual residence or the place of business of the person concerned is abroad. The necessary legal possibilities for collection abroad were not in place until Framework Decision 2005/214/JHA was transposed into national law. The possibilities in Austria and the Netherlands were exceptions to this rule. The law implementing Framework Decision 2005/214/JHA came into force on 28 October 2010.

Convention of 29 May 2000 on Criminal Matters

As stated in art 3 sec 1 the Convention is also applicable as far as proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters. For German LIA procedures this is the case as the decisions can be appealed before a criminal court.

With regard to the LI's (although the procedures are not used) and FKS's investigation activities, the Convention is supposed to be applicable in principle. The Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union was transposed into national law by the Act of 22 June 2005. The Government of the Federal Republic of Germany agreed to the Protocol to the Convention. Statements were made on Articles 9 and 10 of the Convention. Germany has not made statement appointing additional authorities competent for the application of the Convention – as provided for in Article 24 - yet. It therefore remains to be seen whether mutual communication between administrative and judicial authorities and/or between administrative authorities designated as the central authorities will be possible. If not, legal assistance in criminal matters (and in administrative offences) within the EU

will continue to be a matter for the judicial authorities, i.e. the German public prosecutor's office.

Germany has ratified the Convention of 29 May 2000.

Reference is made to the German declaration to art 9 sec 5 and art 10 sec 9 (see BGBl II, 2006, p. 1379 ff.)².

According to the statement provided for in article 24 of the Convention, Germany has not yet specified the authorities under this article of the Convention.

In relation to transmission of requests for mutual assistance (article 6 (6)) no special conditions apply.

In relation to spontaneous exchange of information (article 7) reference is made to the Law on International Legal Cooperation on Criminal Matters (§ 92 Gesetz über die internationale Rechtshilfe in Strafsachen, IRG) and refers to § 61a sec 2 to 4 IRG. The imposed conditions are stated in § 61a sec 2 IRG. The exchange of data is only admissible if the requesting country observes the time limits pursuant to German law for deletion and for review of deletion of the transmitted data, the transmitted data will only be used for the purpose for which they were transferred and the transmitted data will be deleted or corrected immediately upon information in accordance with § 61a sec 4 IRG. § 61a IRG reads as follows: "The receiving authority must be notified immediately upon discovery that transmission of data was inadmissible or that transmitted data were incorrect."

SECTION 4 INTERNAL PUNISHMENT PROCEDURES

Punishment procedures on Occupational Health and Safety Matters

On OSH matters, prosecution of breaches in criminal proceedings is task of the public prosecutor. The role of Labour Inspectorates is to give notification to the public prosecutor in case of breaches. In legal proceedings LI often takes part as witness. In administrative proceedings they can make proceedings of their own (Administrative offences act). LI also can impose administrative fines.

It may be a judicial (penal) proceeding in case of serious infringement and if the prosecutor decides to bring it to the court. It can be a judicial proceeding, when the contravener gives an appeal against an administrative fine.

It is an administrative proceeding, if the prosecutor refuses to bring the breach to the court. It is also an administrative procedure when the infringement is sanctioned by the LI (LI imposes an administrative fine).

² As to Art 9 sec 5 Germany has declared the following:

"Bei einer zeitweiligen Überstellung inhaftierter Personen zu Ermittlungszwecken ist für das Zustandekommen der Vereinbarung nach Artikel 9 Absatz 1 generell die Zustimmung der inhaftierten Person erforderlich."

As to Art 10 sec 9 Germany has declared the following:

"Die Anwendung des Unterabsatzes 1 des Artikels 10 Absatz 9 (Vernehmung eines Beschuldigten per Videokonferenz) wird nicht grundsätzlich ausgeschlossen. Die Vernehmung eines Beschuldigten per Videokonferenz kommt jedoch nur auf freiwilliger Grundlage in Betracht (Artikel 10 Absatz 9 Unterabsatz 3). Darüber hinaus muss auch gegen einen Zeugen oder Sachverständigen (Artikel 10 Absatz 1), der einer Ladung zur Einvernahme durch eine ausländische Justizbehörde im Wege der Videokonferenz keine Folge leistet, nach dem innerstaatlichen Recht der Bundesrepublik Deutschland die Auferlegung von Kosten oder die Festsetzung eines Ordnungsmittels unterbleiben."

If an infringement against OSH-Legislation (possibly leading to an administrative fine) is a simultaneous offence against penal code, the prerogative is to the criminal procedure (i.e. personal injury). It does depend on the decision of the public prosecutor.

It is not permissible to punish an administrative offence (e.g. pursuant to section 404 subsection (2), number 26 of the Third Book of the Social Security Code (*Sozialgesetzbuch III*)) if the offence simultaneously represents a crime (e.g. pursuant to section 263 of the Criminal Code (*Strafgesetzbuch*)).

a) Administrative proceedings

On the spot, Inspectors only can issue a caution. To impose fines, an administrative procedure is foreseen hearing of the contravener. Administrative decisions of fines can be appealed to criminal court by the contravener.

They can be imposed on natural person as well as on a responsible representative of the legal person. In penal affairs only a natural person is responsible. For administrative fines the employer (both natural and legal person) is responsible.

The authorities are competent for the enforcement of fines if they are based on their own decisions?

b) Judicial proceedings

Court proceedings are conducted in criminal courts.

Inspectors and officers sometimes take part as witness, in most cases they are asked as experts. It is at the discretion of the court to decide whether or not to call a member of the administration staff as a witness. They are not judicial police officers.

Inspectors can report to the Public Prosecutor and give evidences. Some regional Labour Inspectorates have signed agreements for exchange of information.

Only a few infringements are reported to the Public Prosecutor.

Punishment procedures for breaches on the posting act: administrative offences

Violations against the provisions of the AEntG may be punishable as administrative offences.

An **employer** or **hirer-out** doing any of the following with intent or negligence:

1. Failing to grant the working conditions stated in § 5 of the AEntG
2. Failing to make a compulsory contribution to a holiday fund,
3. Failing to furnish or incorrectly or incompletely furnishing a required notification or notification of change, or not furnishing it at the right time or in the required manner,

Employer, hirer, hirer-out or employee

4. Failing to tolerate entry to a property or business premises,
5. Failing to tolerate or cooperate with an inspection,

Employer or hirer

6. Failing to record, or incorrectly or incompletely recording commencement, cessation and duration of the daily working times or failing to preserve these records for a minimum of two years,

Employer whose base is abroad or a hirer

7. who fails to give notification pursuant to §18 of the AEntG or does so incorrectly, incompletely or not at the required time,
8. who fails to present an assurance that the working conditions prescribed in §5 of the AEntG are being complied with, or does so incorrectly, incompletely or not at the required time

Entrepreneur

9. Legal action for an administrative offence can also be brought against a business person who obtains a considerable volume of work or service activities by engaging another business person of whom he knows or negligently does not know that
 - the person himself in performance of the contract, or
 - a sub-contractor engaged by him, or
 - a sub-contractor engaged by the sub-contractor

does not pay the minimum wage including overtime supplements, holiday, holiday pay, or additional holiday bonus or does not make contributions to the holiday fund.

Administrative offences as described in 1, 2 and 9 above are punishable by fines of up to **500.000 €**. An administrative offence relating to 3 to 8 above can incur a fine of up to **30.000 €**.

Punishment procedures on Illegal Work

On illegal work, the FKS has the same powers as the police law-enforcement authorities according to the Code of Criminal Procedure (*Strafprozessordnung*) and the Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*) in the prosecution of criminal and administrative offences directly related to issues to be examined as specified in section 2 subsection (1) of the Act to Combat Illegal Work.

To this extent its officials are investigating officers of the public prosecutor's office (section 14 subsection (1) of the Act to Combat Illegal Work). The conduct of criminal proceedings where there is no such direct connection lies within the jurisdiction of the police authorities and cannot be transferred on the instructions of the public prosecutor's office.

FKS distinguishes between administrative-fine proceedings and criminal proceedings. There are no proceedings based on administrative law in this field.

In the prosecution of criminal offences, the staffs of the FKS are investigating officers of the public prosecutor's office.

In the prosecution and punishment of administrative offences for which the FKS is, by law, the "administrative authority" (e.g. for breaches of an obligation to cooperate, the obligation to have a work permit, or the Posted Workers Act), the staff of the FKS have the legal position of the public prosecutor's office.

The decision whether to conduct administrative or criminal proceedings ultimately depends on the legislative assessment. In the case of administrative offences, negligence is sufficient (with the exception of offences pursuant to section 8 subsection (1) of the Act to Combat Illegal Work); by contrast, intent is required for relevant criminal offences (and administrative offences pursuant to section 8 subsection (1) of the Act to Combat Illegal Work).

a) Administrative proceedings

On the spot, a minor administrative offence can be punished with an immediate fine of between €5 and €35 (section 56 subsection (1) sentence 1 of the Administrative Offences Act). The persons affected are informed about their misconduct in writing and the fine levied at the same time.

Administrative decisions of fines can be appealed to criminal court by the contravener. They can be imposed on natural person as well as on a responsible representative of the legal person.

In penal affairs only a natural person is responsible. For administrative fines the employer (both natural and legal person) is responsible.

With regard to the amount, the minimum fine is €5. The maximum fine is €500,000 for certain administrative offences (e.g. employment of a foreigner without permission – section 404 subsection (2) number 3 of the Third Book of the Social Security Code; failure to grant certain working conditions – section 23 subsection (1) number 1 of the Posted Workers Act).

The authorities in charge of the PWD (FKS) are competent for the enforcement of fines where the fines are based on their own decisions.

b) Judicial proceedings

Court proceedings are conducted in criminal courts. The minimum fine is five daily penalty units, the maximum 360 daily units (section 40 of the Criminal Code).

Inspectors and officers sometimes take part as witness, in most cases they are asked as experts. It is at the discretion of the court to decide whether or not to call a member of the administration staff as a witness. They are not judicial police officers.

The officials of the FKS are investigating officers of the public prosecutor's office and act on its behalf. The public prosecutor's office is in charge of the proceedings and applies, for example, for search warrants or attachment orders. The investigating officers summarise the results of their investigation in a final report containing an overview of the investigations carried out and their results, including a legal assessment thereof. No agreements have been made with the public prosecutor's office or the courts on the exchange of information and decisions.

The principle of territoriality

As stated in sections 5 – 7 of the German Penal Code (StGB) German penal law can also apply in cases where the crime is committed outside the territory of Germany. Also as far as the German legislation on infringements (“Ordnungswidrigkeiten“) is concerned German law may apply in these cases in extraordinary and explicitly stated cases. Examples are environmental crimes or treason.

On the procedural level articles 153c and 153d German penal procedural code (StPO) apply. In these cases the public prosecutor has the possibility to refrain from prosecution.

As stated in article 3 of the German Penal Code shall apply to acts committed on German territory. It is irrelevant whether the crime was committed by a German national or a foreigner. However there exist provisions that only apply to German nationals. Certain

persons enjoy immunity and are therefore excluded from prosecution. German Legislation on Infringements (“Ordnungswidrigkeitenrecht”) applies to foreigners as well.

In case of accident at work of a German worker abroad he can go to the civil court and carry the burden of proof by himself. Although, in case of non conviction the worker will have problems to claim, compensation workers get compensation by accident insurance companies (Social Security Code, SGB VII).

SECTION 5. MUTUAL ASSISTANCE AND MUTUAL RECOGNITION IN FINANCIAL PENALTIES

The Framework Decision 2005/214

The Framework Decision has been implemented into German law by the act of 18 October 2010 which was promulgated on 27 October 2010 and which entered into force on 28 October 2010³.

Under the implementing Act, the Federal Office of Justice (in Bonn) has been declared as (only) competent authority. The Federal Office of Justice is responsible for the decision-making process both for incoming and outgoing cases and is therefore the only competent authority to send and execute requests. Other Member States` authorities will only need to cooperate with the Federal Office of Justice. There is no central authority in the sense of Article 2 paragraph 2 of the FD has been designated in Germany.

As stated in Art 1 of the FD 2005/214/JHA it is applicable to decisions issued by a court in criminal matters or by an administrative authority provided that the person concerned has the possibility to have the case tried by a court having jurisdiction in criminal matters. FD 2005/214/JHA also applies where the person concerned appeals the decision issued by the administrative authority and a court having jurisdiction in criminal matters issues a decision as second instance.

For Germany this means that all so-called “Ordnungswidrigkeiten” can be enforced under the FD 2005/214/JHA as the person concerned in these cases has the possibility to have the case tried by a court having jurisdiction in criminal matters. In Germany, all appeals to decisions issued by the administrative authority have to be brought before the criminal court.

For incoming requests the same rules apply. Especially it is important that the person concerned has the opportunity to have the case tried by a court having jurisdiction in particular in criminal matters as far as decisions taken by an administrative authority is concerned.

Germany accepts the certificate only in German language. No declaration according to Art 16 FD has been deposited with the General Secretariat of the Council.

According to the law transposing the FWD, the law should be applied as far as the request concerns a decision made by:

- a) A court of the issuing State in respect of a criminal offence.
- b) An authority of the issuing State other than a court in respect of a criminal offence under the law of the issuing state, provided that the person concerned has the possibility to have the case tried by a court having jurisdiction in criminal matters.

³ Germany has notified the Council Secretariat accordingly. The transposing provisions can be found in the so-called “Gesetz über die internationale Rechtshilfe in Strafsachen (IRG)” article 86 – 87p and article 98

- c) An authority of the issuing state other than a court in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters.
- d) A court having jurisdiction in particular in criminal matters, where the decision was made regarding a decision as referred to in point c).

As far as one of the mentioned conditions is met an OSH fine could be recognised and enforced under the FD 2005/214/JHA.

In general requests sent to Germany under the FD 2005/214/JHA (incoming requests) concern offences committed outside its territory. The FWD mainly applies to cross-border cases.

With regard to the possibility to impose sanctions to Public Administration, German law does not know the principle of criminal liability of legal persons. It is therefore only possible to impose sanction under the German “Ordnungswidrigkeitengesetz”. Nevertheless according to Art 9 sec 3 FWD Germany will be able to recognise and enforce decisions against legal persons although German law does not know the principle of their criminal liability.

As far as the FD 2005/214/JHA is concerned the person concerned has to be heard before the request can be executed and the foreign decision is recognised and enforced. This is stated in article 87c paragraph 1 IRG. Only in exceptional cases the hearing doesn't take place. This is for example the case if the Federal Office of Justice will reject the request right from the beginning due to formal reasons.

If the person is not resident in Germany nor the person has got any property or income in Germany it is not possible to execute the request due to Art 4 FWD. A precondition for the request itself is that the person concerned is resident in Germany or has got property or income there. If the person returns to the country of origin the request will therefore no longer be executed.

As far as judicial cooperation with Austria is concerned administrative offences can also be enforced under the bilateral treaty of 31 May 1988. With regard to the FD 2005/214/JHA bilateral or multilateral agreements are only applicable alongside with the FD as far as they help to facilitate further the procedures for the enforcement of financial penalties (Art 18).

On OSH there are no cases known. The Federal Office of Justice has no experience concerning these labour related cases so far, as the FD 2005/214/JHA only entered in force on 28 October 2010. This concerns incoming and outgoing requests.

The 70 € - threshold has been implemented into German law as a mandatory ground of refusal as the procedural effort for the execution should be in adequate proportion to the fine.

REPORT CONCLUSIONS

In accordance with what was said at the Cibeles Berlin meeting, the powers of Labour Inspection are divided in Germany within different authorities, and therefore they don't have a global view of the problems that may result from the posting of workers and the data transmission between different Members States.

From a comparative perspective, what is particularly striking is the absence of anything equivalent to a general labour inspectorate or work environment authority with (at least) monitoring competences regarding health & safety law and labour/social law in the whole State as one national State Control authority. This is because the German system for safety and health in the workplace has a dual structure, encompassing state (at Federal and Land level) safety and health provision and the autonomous accident insurance institutions. The state (at Federal and Land level) enacts legislation and promulgates regulations and the rules of state boards. After examining their needs, and with the approval of the Federal and Land governments, the accident insurance institutions publish their own accident prevention rules. The enforcement of occupational safety and health legislation in Germany was traditionally not subject to the best possible coordination one could imagine. From a point of view of combating illegal work and social fraud in cross border situations, things got better with the assignment of FKS as monitoring authority.

From the point of view of safety and health, LI bodies of Länder Ministries, found no major problems since the posting of workers usually is made under a subcontracting relationship, and requirements to amend breaches are usually directed to the principal constructor. Thus, there is no real exchange of information between German LI (OSH,) and other LI MS's States, and only we can find direct exchanges with bordering countries authorities.

(In) On the other hand, "custom authorities" charged of the inspection related with the posting of workers, can obtain with their powers data about other labor rights of the posted workers as payment of minimum wages and holidays' payment, among others, and also they can ask for further information through their "Central Liaison Office", as sharing their information with other Member States authorities.

Finally, positive is the fact that FD 2005/214/JHA has been transposed and that the application of it wouldn't cause problems for a lot of Member States, except for those Member States in which administrative fines according to the national legal system are not subject to appeal before a court competent in criminal matters (Example: Belgium) as in these cases FD 2005/214/JHA according to its art 1 is not applicable. The general advantage for Germany is that administrative fines can be tried by a criminal court and therefore fall within the scope of the FD 2005/214/JHA.

Not to forget also: Germany, just like many other Member States, doubts whether breaches on the OSH regulations and hardcore working conditions for posted workers as laid down in article 3 of the directive 96/71/EC may be considered as "— offences established by the issuing State and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty" (article 5, last indent of the FD 2005/214/JHA), in which cases no condition of double incrimination is required for accepting/refusing requests. As these cases have not become practical yet it will remain to every single request to check whether article 5, last indent of the FD 2005/214/JHA is applicable.

7.- REPORT ON ITALY

SECTION 1 “INFORMATION AND STATISTICS ON POSTING OF WORKERS AND PROVISION OF SERVICES”

Declaration and communications on posting

At the Ministry of Labour and Social Policies there is no register and so no procedure concerning the registration, communication and monitoring of the companies coming from EU Member States within a provision of services. The Legislative Office of the Ministry of Labour is preparing a draft of a rule to be inserted in the Legislative Decree 276/2003, which provides for a monitoring/communication system of Member States' employment/temporary job agencies when they post workers to Italy.

With regard to communications of work-related accidents and diseases of posted workers, Art. 53 and 54 of the DPR 1124/1965 state that the employer must communicate to the Insurance Institute (Art. 53) and to the Police (Art. 54), within two days since when he has learnt about it, the accident at work that entails more than three days of inability to work or the death of the worker.

On the other hand, Art. 18 c. 1 lett. r of the Legislative Decree 81/2008 provides for the obligation by the employer and/or the managers to communicate to INAIL (the Italian Insurance Institute for accidents at workplaces and occupational diseases) or IPSEMA (Marine Insurance Institute), and SINF (National Information System for the Prevention at workplaces) within 48 hours since the person in charge receives the medical certificate, for statistical and information purposes the data and information related to accidents at work which entail the absence from work of more than two days, and for insurance purposes those accidents which entail an absence of more than three days.

The posted worker is required to communicate immediately the accident to the sending company. The company is required to communicate the event to Police within 48 hours. Failing what said the same obligation falls upon the contractor (the undertaking receiving the posting) towards the sending company (the undertaking making the posting).

Statistics and data on posting

There is not any statistics on the number of posting of workers in the Labour Inspectorate and only the INPS (National Social Security Institute) may have some statistical data on that concern through the form E/101 (now A/1).

The sectors whereby there are posting workers in Italy are Construction, Transport, Industry and Employment/Temporary Job Agencies on tourism and transport sectors.

Most frequent breaches on posting companies

The most common breaches committed by posting companies in Italy are Infringement of equal wage treatment and undeclared and “partially” undeclared work.

In the Labour Inspectorate there is not any special unit/team in charge of the enforcement of posting workers legislation.

SECTION 2 “LABOUR INSPECTION POWERS TO INVESTIGATE BREACHES”

Competences of the Italian Labour Inspectorate

The Ministry of Labour and Social Policies through the Italian Labour Inspectorate is the main Authority which has the competence of investigating the breaches on the matter of Labour Relations, and in particular the matter of “posting of workers”.

Together with Labour Inspectorate the other authorities concerned together with the Ministry of Labour are the INPS (the National Social Security Institute) and the INAIL (National Institute for the Insurance on Labour Accidents). The Directorate General for the Inspection Activities of the Ministry of Labour coordinates the activities of Labour Inspectorates, INPS and INAIL inspectors. Other than the above mentioned authorities, police forces carry out the vigilance of any infringement concerning the irregular and illegal immigration of workers from abroad.

The competence for investigating breaches on Occupational Health and Safety correspond to the Labour Inspectorate (in particular in the sector of construction and at high risk activities) and the Regional Local Health Administrations (ASL) and within them the SPESALS ((Servizio di Prevenzione e Sicurezza negli Ambienti di Lavoro – Prevention and Safety at Workplaces Services/Departments). The Legislative Decree 81/2008 provides for a mechanism of coordination between vigilance bodies in order to avoid duplications/overlaps or lack of inspections.

Investigation powers of the Labour Inspectorate

Labour Inspectors have the following powers:

- They can visit workplaces without prior notice.
- They can summon company representatives or other persons (e.g. witnesses) in their office in order either to collect all the information necessary to carry out the inspection activity or to notify the measures taken.
- They can request for information from other authorities (e.g. Chamber of Commerce, INPS, INAIL, and so on) and from private stakeholders when necessary for the carrying out of inspections.

Mutual Assistance with other public bodies

Labour Inspectors collaborate with other Bodies such as INPS – INAIL – Police Forces – Chamber of Commerce – Guardia di Finanza (military corps dealing with customs, excise and tax crimes), and other stakeholders.

The Labour Inspectorate has various types of cooperation with all the inspection bodies present in Italy. Various types of committees have been set up composed of the relevant stakeholders: the Regional Coordination Committees (Comitati Regionali di Coordinamento) and the Provincial Bodies’ Committees (Organismi Provinciali).

Other coordination and exchange of information is shared in the working groups set up at the local Prefectures. In particular the necessary information is shared between all the stakeholders through the reciprocal access to all the relevant databanks and through the carrying out of joint and integrated inspections.

As mentioned above, when it is necessary, Labour Inspectors carry out their investigations together with SPESALS, INPS and INAIL inspectors and Police Forces (Guardia di Finanza). It is possible to have joint inspections also with Fire Brigade officials.

Personal data protection

In Italy the protection of data is ensured by the Legislative Decree 196/2003 which transposes the Directive 95/46/EC. Italian legislation covers either natural or legal persons.

Controls on the data processing centre are carried out by the DATA PROTECTION AUTHORITY (DPA) which is the Guarantor for personal data protection (Garante per la protezione dei dati personali) pursuant to laws and regulations in force.

Article 154 provides for the tasks of the Data Protection Authority among which the receiving and examination of reports and complaints in case the data subject reckons that there are infringement to law.

The competence of the DPA covers any kind of processing of personal data carried out by either the Public Administration or private entities (art. 154 of the Code), except for some specific limitations provided for it by the Law.

Generally speaking, Law 196/2003 states that the Public Administration is entitled to make use of personal data to the extent necessary to carry out the tasks which they are in charge for. In those cases in which the public interest and the individual right to privacy are at stake it is needed to find the “equilibrium point” between the two conflicting interests.

Article 4 of the Legislative Decree 196/2003 defines the following positions:

- ‘DATA CONTROLLER’ (in Italian *"titolare"*), shall mean any natural or legal person, public administration, body, association or other entity that is competent, also jointly with another data controller, to determine purposes and methods of the processing of personal data and the relevant means, including security matters;
- ‘DATA PROCESSOR’ (in Italian *‘responsabile’*) shall mean any natural or legal person, public administration, body, association or other agency that processes personal data on the controller’s behalf;
- ‘PERSONS IN CHARGE OF THE PROCESSING’ (in Italian *‘incaricati’*) shall mean the natural persons that have been authorised by the data controller or processor to carry out processing operations;

The Code explicitly provides that when the processing is carried out by the Public Administration the **DATA CONTROLLER is the Public Entity as a whole** that has a fully autonomous decision-making power over purposes and methods/procedures of processing (e.g. the Ministry, etc.).

DATA PROCESSOR is the Labour Inspectorate which acts following the instructions given by the Ministry of Labour (art. 29). The appointment of the Data Processor must be done in writing and precisely identified within the limits of the processing permitted.

Lastly, the **PERSON IN CHARGE OF THE PROCESSING** is the natural person that has been authorised by the data controller or processor to carry out processing operations (e.g. the employee that materially inputs the data into the database (art 4 lett. h - art. 30).

Therefore either the LIA Office or the person in charge for the proceedings (in this case the LIA inspector and others) is responsible for the surveillance of the processing of personal data.

LIA need to notify the automatic processing of personal data to the Data Protection Authority only the processing provided for by article 37 of the Law: among others genetic data, health, sex life, the psychological sphere, personality, stored in data banks for personnel selection purposes on behalf of third, etc.

In the transmission of personal data (as a part of processing), it is important to underline that the rule according to which the processing of personal data is allowed **with the data subject's consent** or under the requirements provided for it by Art. 24 of the Code is applicable only to those cases when the data processing is carried out by private entities and public economic bodies (state-controlled companies / for-profit public entities).

The processing of personal data by the Public Administration is regulated by Article 18 and followings of the Law. In particular the processing of data by Public entities, without the consent of the data subject, is permitted only for the discharging of their institutional tasks.

Article 19 provides that communication by a public body to other public bodies shall be permitted **if it is envisaged by laws or regulations**. Failing such laws or regulations, communication shall be permitted if it is necessary in order to discharge institutional tasks and may be started upon expiry of the term referred to in the Article. 39 paragraph 2, if it has not been provided otherwise as specified therein.

Stricter rules concern the data processing of Sensitive and Judicial Data (see definitions Art. 4 par. 1 – let. d and e). Processing of sensitive data by public bodies shall only be allowed where it is expressly authorised by a law specifying the categories of data that may be processed and the categories of operation that may be performed as well as the substantial public interest pursued, or according to the rules provided for by Articles 20 and 21 respectively.

With regard to the data relating to administrative or criminal sanctions or to a suspected subject of administrative or criminal offences, Article 25 of the Code states:

1. Communication and dissemination of data shall be prohibited if an order to this effect has been issued by either the Guarantor or judicial authorities, as well as a) with regard to personal data that must be erased by order, or else upon expiry of the term referred to in Article 11(1), letter e), b) for purposes other than those specified in the notification, whenever the latter is to be submitted.
2. This shall be without prejudice to communication and dissemination of the data as requested, pursuant to law, by police, judicial authorities, intelligence and security agencies and other public bodies according to Section 58 (processing operations carried out by public bodies for purposes of defence or relating to State security, as expressly required by laws that specifically provide for such processing operations), for purposes of defence or relating to State security, or for the prevention, detection or suppression of offences.

In Italy the legislation related to Safety and Health at workplaces is mainly penal and the procedures provided for it by the Law involve the communication of the infringements found during the inspection activity and the duty-holder personal data like his/her particulars (name, surname, date of birth, place of residence), other than the data concerning the company. Also the administrative procedures

provide for the communication of data to other bodies involved like INPS, INAIL, and so on.

SECTION 3 “MUTUAL ASSISTANCE IN INVESTIGATION OF BREACHES”

Mutual Assistance at European level

Mutual Assistance with other Labour Inspectorates is provided in article 5 of the Legislative Decree 72/2000 which transposes the Directive 96/71/EC.

At the moment it is only possible to observe some limited agreements on specific matters between Italy and some other Countries. Such as:

1. Protocol of cooperation of the 29th November 2010 with the Romanian Labour Inspectorate concerning the administrative cooperation in the field of labour inspection, with particular reference to posted workers pursuant to art. 3 of Directive 96/71/EC, to preventing and combating undeclared and irregular work, as well as to checking the actual conditions of employment and safety at the workplace.
2. Italic -Spanish “Joint Declaration” of the 14th December 2007 , concerning the mutual exchange of information, good practices, and inspectors in the matter of irregular work, the underground economy, and off-the book employment.
3. Agreement with Switzerland.
4. Declaration of Cooperation between Italy and France of 27th September 2011, concerning the control of transnational mobility of workers and the fight against the illegal work.

There are also experiences of mutual assistance between Labour Inspectorates at regional level with the French authorities in trans-border construction sites in Piemonte and Rhone Alps Regions.

The Italian Labour Inspectorate has not any records of cases in which has needed evidences from other Member States or has been requested to send evidences to other Member State.

KSS has also been used to exchange of technical information with other European Inspectorates.

With regard to the personal data protection in these procedures it is necessary to distinguish between the case in which the transmission occurs within the European Union and the case in which it involves other countries.

In the first case applies the principle of the free circulation of data among Member States that by definition should have a uniform standard level of protection (Art. 42 of the Code). The transmission of data that occur among other Countries is permitted only under the observance of the criteria stated in the articles 43 and followings of the Code.

Convention on Mutual Assistance on Criminal Matters

Italy is one of the few Member States that has not ratified yet the Convention of 29 May 2000, in spite of the fact that the Convention has come into force on August, 23 2005.

SECTION 4 INTERNAL PUNISHMENT PROCEDURES

In Italy the enforcement of industrial relations mainly implies administrative proceedings, while the OSH legislation provides mainly for judicial proceedings and in particular criminal proceedings.

Administrative and penal responsibility lays on whoever has committed the violation which means employer and/or manager, proxy, controller, etc.

Administrative proceedings

The Administrative procedures are normally provided in case of industrial relations infringements and other related to either documentary faults or minor offence, but also on Occupational Safety and Health matters the law provides in a few cases for administrative sanctions. The nature of proceeding and the sanctions are already stated in the law.

When the infringer does not pay the fine inflicted the Legal Department of Territorial Labour Inspectorates (Direzioni Territoriali del Lavoro) deals with the case. The infringer has the possibility of lodging an appeal to be examined by the Head of the Office. If the appeal is considered well-grounded the file is dismissed, otherwise an order of payment (injunction order) is issued. At this point the infringer can appeal the decision before the administrative/civil court.

Administrative fines and penalties can be imposed on legal persons. Law No. 689/81 ties up a joint liability (“in solido”) in the person who has committed the violation and the legal person.

Criminal Proceedings

Pursuant to the Legislative Decree 81/2008 almost the entire sector of Occupational Health and Safety provides for criminal proceedings with some particularities. If the infringement has been eliminated as a result of a Labour Inspection improvement notice (prescrizione), the infringer can be allowed to pay an administrative fine (Art. 20 and 21 of the Legislative Decree 758/94) against which he/she can appeal the judgement of the criminal courts.

The proceedings are carried out by either the LIA or by SPESALS, and only in case the duty-holder does not comply with the orders (prescriptions) of the inspectors and/or does not pay the pecuniary sanction inflicted by them, the Public Prosecutor takes criminal proceedings against the infringer. The Legislative Decree 758/94 (See Annex 2) contains all the procedures related to the infringements of the Legislative Decree 81/2008.

All Labour Inspectors are appointed Judicial Police officers and have the duty of communicating as soon as possible the violations considered as crimes to the Public Prosecutor, by sending him/her a copy of the report. The Public Prosecutor keeps, according to the above mentioned Legislative Decree 758, the criminal action suspended for 120 days until the Labour Inspector has informed about the compliance with the prescription/order issued and the payment of the fine. In case of not compliance and /or non-payment of the fine the criminal action takes place.

In the course of the criminal trial inspectors could be summoned as witnesses and to confirm what written in the report. In case of accident at work inquiry inspectors report the findings to the Public Prosecutor.

According to what is provided for it by the law the judicial police (the Labour Inspector) must support, when requested, the Public Prosecutor with evidences and reporting to him/her whatever they find during their activity in connection with the criminal offences found.

In Italy the Public prosecutor is a magistrate who charges the infringer with the violation/crime found. Subsequently the Public Prosecutor brings the case before the criminal court. The Public Prosecutor is a magistrate with investigation powers (magistrato inquirente), while the judge of the criminal court is a magistrate with judging powers (magistrato giudicante). When required another magistrate the examining/preliminary investigation magistrate (Giudice per le indagini preliminary) intervenes. All the magistrates mentioned above have different tasks and cannot have any role in other procedures.

As for the posting of workers with regard to the liability, Article 3 par. 6 of the Legislative Decree 81/2008 provides that only the company that carries out the work (CONTRACTOR) is responsible for the Prevention of accidents at workplaces and occupational diseases. The posting company is responsible for informing and training the posted worker about the risks generally related to the tasks for which the worker has been posted. Otherwise normally the responsibilities related to OSH violations lie with a chain of subjects among which “in primis” the employer followed by proxy, manager, and so on.

On June 8, 2001, the Italian Government – in compliance with the principles set forth in EU legislation on the prevention of corporate crimes and the assessment of companies’ liability – enacted the Legislative Decree no. 231/01 (hereinafter the “Decree no. 231”) that introduced for the first time into the Italian legal system the **direct liability of companies** and other legal entities for crimes committed by directors, executives, their subordinates and other subjects acting on behalf of the legal entity (e.g. the agents), when the unlawful conduct has been carried out in the interest of or to the benefit of the company concerned.

The Decree No. 231 introduced the regulatory framework governing the “*administrative liability of legal entities, companies and associations, including bodies devoid of legal personality*”. However, the penalties to legal persons involved should be imposed by criminal courts and not by administrative bodies since it is considered by the Italian law that “criminal liability” can not involve legal persons.

Currently the crimes provided for by the Decree no. 231 are, among others, “as per Law no. 123 dated August 3, 2007, the crimes against the person (manslaughter and negligently causing serious or very serious injuries), **committed in violation of safe working practices and the protection of hygiene and health at work**”.

Among the penalties provided for by the Decree no. 231, the most serious are the ban from business activity, suspension or withdrawal of licenses and permits, prohibition to contract with the State or Governmental agencies and exclusion or revocation of financing and subsidies. However, this “administrative” liability is exclusively determined by criminal courts within the judicial procedure.

As judicial police officers, the Labour Inspectors and other competent authorities can also initiate criminal procedures against Public Administration in Italy. There is no case of immunity.

The minimum amount of administrative fines for OSH breaches is € 50 and the maximum is € 40.000. The Legislative Decree 81/08 contains 306 articles and 51 attachments.

Almost each violation is punished with a sanction. There are cases (less serious offence) in which the breach is punished with an economic sanction, but in most cases the sanction provided for the breach committed is penal. This means that the infraction is considered a crime. Namely the penalty provided for is defined as a contravention (contravvenzione) that is punished alternatively either with "arrest" or a "fine".

The principle of territoriality

The penal suability both of Italian citizens and the foreigner residing in Italy for a crime committed abroad is regulated by some provisions of the Penal Code.

Articles 7, 8 and 9 of the Penal Code provide that either the Italian citizens or the foreigners are punished according to the Italian Law in case they have committed some particular crimes in which OSH offences could be included when they entail a minimum of one or three years of imprisonment.

On the other hand, whoever commits a crime in the territory of the State is punished according to the Italian law. The crime committed abroad is considered as committed in the territory of the State, when the action or the fault has totally or partially taken place in State, or there has occurred the event that is the consequence of the action (crime) or the fault.

With regard to the application of the Italian OSH rules in the case of posting of workers, while the rules concerning OSH fall upon the undertaking receiving the posting, the obligation concerning information and training falls upon the undertaking making the posting. It is important to underline that also the medical surveillance is an obligation that falls upon the latter.

SECTION 5. MUTUAL ASSISTANCE AND MUTUAL RECOGNITION IN FINANCIAL PENALTIES

The FWD 2005/214/JHA

The FWD 2005/214/JHA has not been transposed into the Italian legislation. By means of Law 25 February 2008 No. 34 the Italian Parliament has delegated the Government to issue, within twelve months, a Legislative Decree to transpose, among others, the FWD 2005/214/2005. At the present time the FWD has not been transposed yet.

Nevertheless, failing the above mentioned transposition it is important to underline the existence of a set of rules of the domestic law concerning the recognition of pecuniary sanctions following a recognized foreign judgement pursuant to Articles 735 (paragraph 5), 738 and 740 of the Penal Procedural Code following the traditional procedure of "exequatur".

The set of rules concerns the recognized foreign penal judgements. When the Italian Minister of Justice receives a conviction related to a judgement given abroad on Italian or foreigner citizens residing in that Country, he sends a copy of the judgement, immediately to the General Prosecutor at the Court of Appeal, together with its translation into Italian language, and any relevant legal proceedings, information, documentation. It will be the Court of Appeal to decide on the recognition of the judgement, under the necessary conditions provided for by the law.

Art. 735 of the Procedural Penal Code states that when the judge decides on the recognition of the judgement has also the task of deciding on the punishment to inflict, and in particular on the pecuniary sanction to be given. The paragraph 5 of the same article provides for a criterion of conversion of the pecuniary sanction into Euros, explicitly clarifying the duty of the assessing the pecuniary sanction to enforce the judgement.

Furthermore Art. 738 of this Law states that the penalties, and the confiscation subsequent to the recognition of a judgement are executed according the Italian law, and that the execution of the judgement is carried out by the Prosecutor General who has decided on the recognition. Article 740 provides that the amount of money deriving from the sanction shall be lodged in the fines' fund.

Italy has ratified in 1985 the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 1978) that at the Art. 3 provides that the Convention will be applicable also: 1. to the Notification of documents concerning the execution of a penalty, the collection of a pecuniary penalty and the payment of the cost of legal proceedings (costs of the trial). The mentioned rule does not allow the collection of the sanction but the notification of the documents aiming at the collection.

Moreover Legislative Decree 7 September 2010 No. 161 has transposed the FWD 2008/909 concerning the mutual recognition of final judicial decisions inflicting either imprisonment or deprivation of liberty.

Legislative decree no. 161/2010 was adopted with a view to compliance with Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. This regulation specifies the definitions used in this area and identifies the relevant national authorities and the conditions for the forwarding abroad of a judgment in a criminal matter, the procedure to be followed for the reception and forwarding of a judgment, and the conditions for the implementation of provisional detention measures.

8.- REPORT ON PORTUGAL

SECTION 1. INFORMATION AND STATISTICS ON POSTING OF WORKERS AND PROVISION OF SERVICES

The declaration of posting

In Portugal, the posted workers Directive was adopted by Law (n.º 9/2000 of 15 June 2000). The Labour Code (Law n.º 99/2003 of 27 August 2003) and its regulation (Law n.º 35/2004 of 29 July 2004) reproduced the stipulations of the transposition from 2000. The most recent revision of the Labour Code by Law (n.º 7/2009 of 12 February 2009) introduces some innovation in the legal framework (articles 6.º, 7.º, 8.º).

According to the revised Labour Code (Article 8-2), employers have since February 2009 the obligation to inform authorities in advance (five days) about the identity of posted workers, of the user, the workplace, and the duration of posting (but not the nationality).

This communication must be reported to the LIA, and in general is also made before the Finance Authority which can, if requested, fulfil it to the LIA.

Disobedience of this rule is subject to the payment of a substantial fine (*contra-ordenação grave*).

Posted companies are legally required to communicate work-related accidents of posted workers to the Labour Conditions Authority when they are considered fatal or serious. In case of non-serious accidents or occupational diseases the current legislation does not provide the obligation of posted companies to communicate them.

Data on posting workers

As it was said at the Lisbon meeting, there are not many workers posted in Portugal from other M.S., and those who are posted to this country are in general highly qualified technicians and managers, but also we can find workers posted from Romania and Bulgaria to **the agricultural sector**.

No objective data about the posted workers are presented at the meeting, but the major sectors where posting workers can be found in Portugal are construction, maintenance, logistic and agriculture.

Infringements on posting workers

The most common infringements committed by posting companies are related to OSH matters in the building sector and driving hours/rest periods in the road transportation.

In 2010 LIA imposed 11 fines (14.892€ to 38.046€) on posting companies.

Role of the Labour Inspectorate

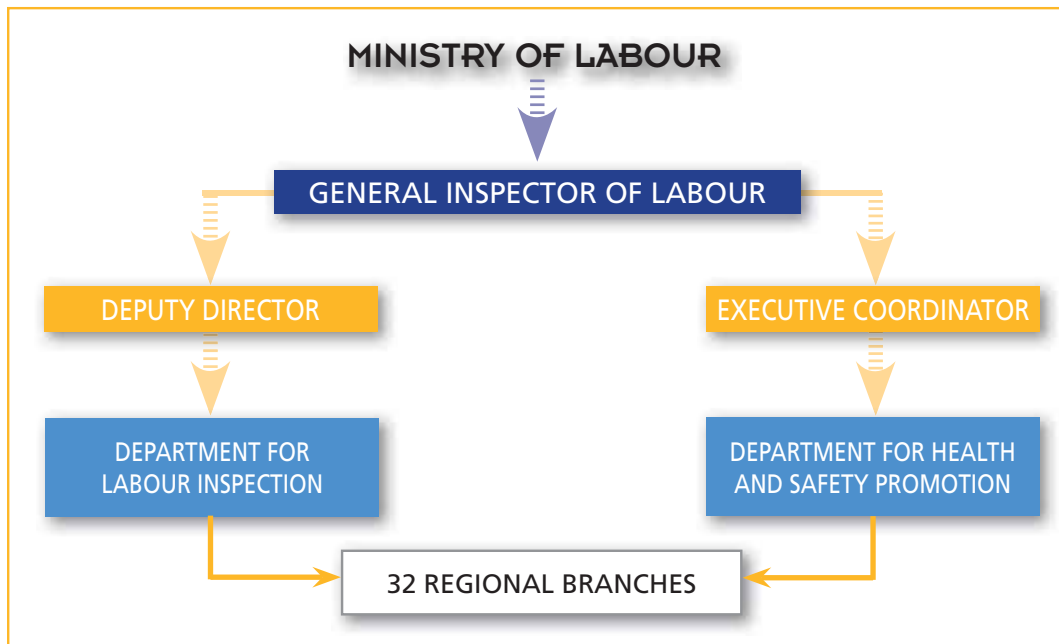
The Labour Inspectorate Authority is the “Liason Office” for the posting of workers.

The Portuguese Labour Inspection System does not have a special unit in charge of the enforcement of posting workers legislation, since it is a generalist Inspectorate. Labour Inspection is also charged of surveying the labour conditions of the Portuguese workers posted in another M.S.

SECTION 2 LABOUR INSPECTION POWERS TO INVESTIGATE BREACHES

Organisational Structure

The organic structure of the Portuguese Labour Inspection, is a department relaying in the “Autoridade para as condições de trabalho - ACT” (Authority for Labour Conditions) directly under the Ministry of Labour and Social Solidarity but endowed with administrative autonomy, possessing powers to ensure compliance with legal provisions on working conditions and the system of employee protection, according to the principles set out in the ILO Conventions: n° 81, n1° 129 and n° 155, structured as shown below.



The Labour Inspectorate is assisted by the Sub-inspectors (to disappear) and the Safety and Health Technicians, all of whom belonging to the ACT Department, which is divided on five regional offices (North, Central, Setúbal, Lisbon and Taijo Valley, Alentejo and Algarve) and 32 branches or administrative units below.

Powers of the Labour Inspectorate activities

The Portuguese Labour Inspectorate is generalist, and has the powers of a public authority, and exercising his functions he may;

Article 4 of the Legislative Decree 196/2003 defines the following positions:

- Request the cooperation of the police authorities, inspect any workplace at any time of day or night, without prior notice, but with full respect for the rules established in the Criminal Procedure Code, request information from employers and employees, examine documents, request information concerning products, substances and take samples.
- Adopt notifications of measures to be taken at the workplace within a specified time in order to ensure compliance with legislation, adopt notifications of measures to be adopted immediately/suspension of activities in the event of serious risk or

high likelihood of harm to workers' lives, physical integrity or health, adopt official warning where the offence involves an irregularity which can be rectified and so draw up an official warning, indicating to the offender the offence detected and the recommended measures to be taken, with a specified time-limit for compliance, conduct investigations into cases of fatal accidents at work or particularly serious, or occupational diseases which cause serious injury, without prejudice, in this case, the powers of other entities with a view to developing appropriate prevention measures in the workplace.

- Issue the relevant prosecution report, when verifies that a criminal offence has been committed.
- Arrest on the spot, according to the rules established in the Criminal Code and in the Criminal Procedure Code.

Mutual Assistance in enforcement activities

In the exercise of their functions all entities of Public Administration should give to LIA all collaboration that may be requested to pursue the enforcement, as well as information in their possession, without prejudice to the legal limits set out in relation to personal data.

All entities of Public Administration should give to LIA all collaboration that may be requested, without prejudice to the legal limits set out in relation to personal data , and vice versa LIA participates other entities of Public Administration all illegal situations that fall under their scope.

Labour inspectorate collaborates with police authority, judges and prosecutors, on the terms established in the Labour Code, and in the Criminal Procedure Code.

Data Protection

Portugal has transposed the Directive 95/46/EC by the Act 67/98 of 26 October, Act on the Protection of Personal Data.

The Authority charged of Data Protection is the National Commission on Data Protection ("Comissão Nacional de Protecção de Dados" CNPD).

The powers of this Commission (CNPD) are, among others, the supervision and monitoring of the compliance with the laws and regulations in the area of personal data protection and the consultation on any legal provisions and on legal instruments relating to the processing of personal data.

With regard to the Labour Inspectorate activities, the "General Inspector of Labour" is the responsible of the treatment on personal data, and he should notify the CNPD before carrying out any wholly or partly automatic processing operation or set of such operations intended to serve a single purpose or several related purposes.

Pursuant the Portuguese Law the combination of personal data not provided for in a legal provision shall be subject to the authorisation of the CNPD, requested by the controller or jointly by the corresponding controllers under Article 27 of the Law.

The combination of personal data must be necessary for pursuing the legal or statutory purposes and legitimate interests of the controller, must not involve discrimination or a reduction in the fundamental rights and freedoms of the data subjects, and must be covered.

SECTION 3 “MUTUAL ASSISTANCE IN INVESTIGATION OF BREACHES”

Experiences on cross-border collaboration and mutual assistance

As it was said, they don't have records of cases in which Portuguese LIA or the competent authority for imposing sanctions, has needed evidences from other Member States or has been requested to send evidences to other Member Stat

Anyway, in the inspection proceeding (physical evidence, samples, documentary evidence, statements, confessions, etc.) evidences coming from abroad can't be used in the administrative procedure (they can be used in criminal procedure).

Transmission of OSH enforcement information to other countries

Labour Inspections from other Member States are foreseen as possible recipients of transmission of personal data, but always with the permission of Data Protection Authorities.

Bilateral agreements

Portugal has signed some treaties and agreements with other Labour Authorities, mainly for the exchange of information in matters related with undeclared work and OSH.

Cooperation Agreements has already being signed up with the following countries:

1 – Bulgaria 2 – Belgium 3 – Spain 4 – Poland 5 - Republic Srpska 6 - Republic of Serbia
7 – Romania 8 – Tunisia.

An agreement is being finalized with Luxembourg, to be signed in July, and first bilateral contacts have recently started with the French Labour Inspectorate.

Examples

Spain

The Agreement on Information Exchange and Cooperation between the Authority for Working Conditions of Portugal and the Labour Inspectorate and Social Security of Spain is based on a platform of cooperation between both countries covering industrial relations (namely the construction sector), with particular emphasis on the prevention of occupational risks and industrial accidents of transnational and cross border workers.

Belgium

It has also been signed an Agreement between the Authority for Working Conditions of Portugal and two services under the Federal Public Service Employment, Labour and Social Dialogue of Belgium, aiming to exchange information on the working conditions of posted workers on both countries.

France

It is being developed a Cooperation Agreement between the Authority for Working Conditions of Portugal and the National Institute for Research and Security of France (INRS), with the objective of preventing occupational risks.

All these Agreements are based on exchange of information and experiences in the areas of the Labour Inspection and Health and Safety at Work. There are, however, Agreements with more specific characteristics, which we identify as follows:

SECTION 4. INTERNAL PUNISHMENT PROCEDURES

Operating procedures of Labour Inspectorates has a curious duality. The criteria for administrative or judicial procedure is always determined by law: (a) follows an *administrative procedure* when the offense is punishable by a *fine*; (b) follows the *criminal procedure* when the offense is punishable with *criminal penalty*.

Administrative proceedings

The **administrative procedure** takes place when an official report for infringement is drawn up where the Labour Inspector is personally and directly aware during the performance of his activities, and also indirectly aware, that there has been an infringement of the labour regulations subject to inspection by LIA which is punishable by a *fine*.

When the acting Labour Inspector understands that the infraction has an administrative character, according with Law (CONTRAVENTION or MINOR OFFENSE) due to the nature of the committed violation, the infringement procedure continues this route. The offender has two possibilities; or to pay the fine, or to appeal it, first to the Labour Inspection Directory, and then before a Labour Court. Also if the offender does not pay, the process is sent to the Labour Court (Public Prosecutor). In those later cases, it becomes a judicial procedure with an administrative character, in which participates the Advocate General's Office. There can be a condemnatory or absolutive conviction decision, whether wholly or in part.

Minimum and maximum amount of administrative fines on OSH breaches ranges from 204€ to 122.400€.

Criminal proceedings

If the governing performer understands that the illicit has a penal character (BREACH), the actions are sent to the Attorney General's office in order that it proceeds, if he considers it pertinent, before the Penal Court; the Attorney General's office can understand that the conduct of the supposed offender is not constitutive of penal sanction, but administrative. In this case the process is returned to the ACT in order that actions are continued (administrative procedure).

If the Labour Inspector doesn't know if the facts are or not a crime, he should sends the report to the Public Prosecutor, and the Court decides if it is a crime or not.

In case of a very serious or fatal work accident the report must be sent to the Criminal Court.

The Penal Code presents crimes against the employees' security, and crimes against the Construction Law.

Administrative fine can be imposed to natural or legal persons (employers or their representatives). Criminal procedures sanctions can only be imposed to natural persons.

The competent authority for enforcing the administrative fine, in case this is not paid by the employer, is the Public Prosecutor at the Labour Court.

Principle of Territoriality

The Portuguese law allows prosecution of an offence when committed outside the national territory.

If a person who is based in Portugal commits an offence in another country the offence can be tried in Portugal, under the condition that the crime/offense committed is also considered a crime/offense according to the national legislation. The competent judicial authority to promote the prosecution is the Public Prosecutor.

A foreign person who commits an offence in Portugal can be judged and convicted according the Principle of Territoriality.

SECTION 5 “MUTUAL ASSISTANCE AND MUTUAL RECOGNITION IN FINANCIAL PENALTIES”

The FWD 2005/214/JHA

There are no records of cases in which LIA or the competent authority for imposing sanctions has attempted to enforce a fine in another Member States according to the FWD 2005/214/JHA. There are neither records of cases in which Portuguese authorities have been requested to enforce a sanction from another Member State.

In Portugal appears that it is not possible to notify fines to the company that has already turned back to its country.

The National legislation allows executing all the fines, including the administrative fines, which have been imposed by other MS.

The Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, has been transposed into the national law (Law n° 93/2009).

It is considered that the FWD 2005/214/JHA is applicable to LIA enforcement procedures. Law n° 93/2009: art. 3° point No. 1 defines a series of offences which are punishable. The point No. 2 of the same article states that for the offenses not listed in the article, the recognition and enforcement of the decision by Portuguese judicial authority shall be subject to the condition of the decision relates to acts which infringe punishable by Portuguese law, regardless of their constituent elements or their qualification right the issuing State.

In relation to article 2 of FWD 2005/214/JHA, the authority or authorities that are competent as both issuing and executing is:

- 1) The Court that has taken the decision or,
- 2) If the decision was taken by an administrative authority, the Court competent to execute it.

Article No. 8 of the Law states that: The Portuguese authority responsible for issuing the decision of the sanction and forwarding it to the competent authority of the State of execution:

- a) The Court which has taken the decision;
- b) If the decision had been taken by the administrative authority, the Court competent for its execution.

In Portugal the Administration Bodies cannot execute fines. That power is reserved to the Court.

The competent Portuguese authority does accept the standard form certificate requesting execution in EU official languages other than national language.

According to the law transposing the FWD, OSH fines from other MS are recognized and enforced in Portugal under the condition that the decision relates to acts which constitute an offense punishable by Portuguese law.

The Portuguese Labour Inspectorate can impose sanctions to Public Administration. As a matter of fact LIA is responsible for promoting, controlling and supervising compliance with legal provisions relating to safety and health at work also towards the Public Administration.

The national law lays down that the person concerned has to be always personally informed of the proceeding and he has right to contest the case but it's not necessary that he appears personally in the legal proceeding, and it is not necessary that he appears personally in the legal proceeding.

The person or the company concerned when he/she/it returns to the country of origin will be informed through the Judicial Authorities.

Scope of Directive 2010/24 EC

Portuguese Inspectorate authorities consider that the Directive 2010/24/EC is not applicable to administrative OSH fines, as it was said at the Lisbon meeting, because they think this Directive is concerning only with matters relating to taxes and duties.

9.- REPORT ON SPAIN

SECTION 1. INFORMATION AND STATISTICS ON POSTING OF WORKERS AND PROVISION OF SERVICES

The Declaration of Posting

According to the Law 45/1999 (which transposes into the Spanish legislation the Directive 96/71/EC), companies coming from other MS are required to communicate their posting to the Labour Authority of the Autonomous Community where the workers will be posted. In this communication the following data should be included:

- Name of the undertaking company
- Name of the posting company.
- Names of posted workers
- The period of presence provided for
- The service provision or provisions for which the worker is to be posted

In each one of the Autonomous Community, Labour Authorities receive the posting communications and they usually transfer them to the Provincial Labour and Social Security Inspectorates (hereinafter Labour Inspectorate) in order to check if the company from abroad is complying with the provisions of the Law 45/1999.

Labour Inspectors could also request Labour Authorities for information about these declarations but currently Autonomous Communities have not elaborated a data base with these communications and this information is not always easily obtained.

The Labour Inspectorate has not any data base with the declarations received from the Labour Authorities.

The Spanish legislation does not require posting companies to appoint a legal representative.

Posted companies are legally required to communicate work-related accidents of posted workers to Spanish Labour Authorities when they are considered fatal or serious. In case of non-serious accidents or occupational diseases the current Spanish legislation does not provide the obligation of posted companies to communicate them to Labour Authorities and there are not guidelines to evaluate the accidents or diseases as serious. Consequently, the most of them are not communicated.

Registration for the Construction Industry

For the construction industry, the Royal Decree 1119/2007, which develops the Law 32/2006 on subcontracting in the construction sector, establishes a Register for all the companies of this sector relating to, among others, OSH matters, named R.E.A. Companies from other EU countries also should be registered, unless the posting does not exceed eight days. In the successive postings, companies should note in their communication the number of R.E.A.'s enrolment.

With regard to work-related accidents and professional/occupational diseases, posting companies from other EU countries which maintain the Social Security from the country of origin, are only obliged to declare the serious and fatal accidents and diseases.

The Register on companies of the Construction Industry "R.E.A." is available in a data base at National level and the Labour Inspectors have access to it.

Data on posting workers

In Spain there are not any statistics of the Labour Authorities on posting companies or workers at National or Regional level and neither about the number of declarations which have been submitted to the Autonomous Communities.

The Social Security bodies could have data on posting workers but in their data base is only registered the extension of A 1 forms over a year or other documents which demand the authorisation of the competent authorities of a Member State.

The Public Social Security bodies have in the national data base the A 1 forms that they have delivered but they do not have the forms delivered by other Member States for the posting to their own countries. They access to these forms for previous request.

In 2012, when the EESSI starts to work, all the information about A 1 forms will be available for all Member States using the same parameters and contents in all MS. Labour Authorities could know information related to A 1 forms delivered by competent authorities including the posting period for each worker. It will be necessary that Labour Inspectors could access to this kind of information.

Construction and shipbuilders are the main areas of activity for posting workers from other Member States.

Breaches on posting workers

In this matter, the most common breaches are:

- Lack of communication to the labour authority about the workers movement
- Lack of notice to the sec. social country of origin about the workers movement.
- Payment of wages below what is provided in the law or in the collective agreement

Labour Inspection Authority has statistics about the Labour Inspectors performances in the control of posting companies communications. We have the following data relating to 2010:

- Performances on OSH matters
 - Number: 601
 - Contravention Notices: 4
 - Amount of the fines: 7.038 €
 - Improvement Notices: 73
- Performances on Labour Relations issues
 - Number: 1543
 - Contravention Notices: 144
 - Amount of the fines: 420.414 €
 - Improvement Notices: 114
- Performances on Social Security issues
 - Number: 52
 - Contravention Notices: 9
 - Amount of the fines: 10.002 €
 - Recovery of Social Security Contributions: 6.687 €

- Performances on non EU Foreign Workers
 - Number: 5
 - Contravention Notices: 21
 - Amount of the fines: 210.000 €
 - Improvement Notices: 0

We have specific data about the number of fines which have been imposed to foreign companies for not communicating their posting. Other data are not available since it is not distinguished if the company is posted or not

There are 129 Contravention Notices by lack of posting communication with a total amount of 397.882 € and 75 Improvement Notices. The number of workers affected was 1.494.

There is not a special unit within the Spanish Inspection System, in the Ministry of Labour and neither in the Autonomous Communities in charge of that issue.

SECTION 2 LABOUR INSPECTION POWERS TO INVESTIGATE BREACHES

Powers of the Spanish Labour Inspectorate

According to the Labour and Social Security Inspection Act, the Labour and Social Security Inspectors (hereinafter Labour Inspectors) are the civil servants responsible for investigating OSH breaches. These ones are in charge of the surveillance and enforcement of all the matters related to industrial relations (wages, working time, basic labour rights as non discrimination in labour or the right to dignity at work) and social security (undeclared and illegal work).

Concerning the investigation powers of Labour Inspectors:

- They are authorized to enter, freely at any time without prior notice, at any workplace, establishment or place subject to inspection and remain in it
- They are entitled to request for information, alone or before witnesses, to the employer or the staff of the company on any matter concerning the application of the laws, and to ask identification, or the reason of their presence, to people who are in the workplace inspected.
- They can require the attendance of the employer or their representatives and managers, employees, recipients and welfare applicants and any person included in its scope, in the workplace inspected or in public offices designated by the acting inspector.
- They can require information (all kinds of data, records, or relevant information for inspectors' tasks) from any natural or legal person (provided they are deducted from their economic, professional, business or financial relations with third parties subject to inspection action) as long as the request was done in formal way. This obligation extends to the associates of the bodies of the Social Security fund and depository cash or funds in the identification of payments charged to accounts that are indicated in the corresponding request, and may not rely on bank secrecy.

- Other powers:
 - Labour Inspectors can initiate the administrative infringement procedure in case of breaches on Labour, OSH and Social Security legislation.
 - They can order the stoppage of the workplace in case of serious and imminent risk for workers.
 - They can propose to the Labour Authority the closing of a workplace by OSH reasons.
 - They can propose to recover social security contributions.
 - They can propose to affiliate workers to Social Security System.
 - They can propose to Social Security bodies to impose to the employer a surcharge on the benefits for the worker who has suffered a work-related accident caused by an OSH infringement.

Mutual Assistance with other public bodies

All public administrations and whoever people developing public functions, are bound to provide cooperation to the Inspectorate of Labour and Social Security and provide the information at their disposal if they are requested for it and it is necessary for the exercise of the supervisory function (i.e. the tax authorities will transfer their data and background- in the terms set out by tax legislation-; all entities from the Social Security System shall also cooperate providing information, background and relevant data; the Security Forces will provide their assistance and cooperation to the Inspectors when they carry out their functions; the courts provide, “ex officio” or upon request of, any information related to the inspection tasks that result from the actions they know and not be pending of judgment).

Labour Inspectors should communicate to Labour Authorities and Social Security entities all the necessary information to carry out their tasks. In addition to this, when the Labour Inspectors know about potential breaches or infringements, which are out of their scope, they can communicate them to the competent Authority.

There are agreements and protocols between the Labour Inspectorate and other public bodies:

- An agreement with the Tax Inspectorate to exchange information and collaborate on the fight to undeclared economy.
- A protocol for the investigation of crimes on OSH in order to communicate to the Public Prosecutor the acts which initiate the administrative infringement procedure when they are based on serious or repetitive offences and can constitute crimes.

Joint actions are currently carried out with the following public bodies:

- Collaboration with experts of the Regional Entities of OSH pursuant to agreements at regional level.
- Collaboration with tax inspectors within a Comprehensive Plan for Prevention and Correction of Tax Fraud, Labour and Social Security.
- Collaboration with the Police on the enforcement of the foreign workers legislation.

Data Protection during the investigation

Relating to the exchange of relevant information with other Member States, the Spanish Inspectorate is currently using the KSS system to exchange information with other SLIC Members by electronic means and a representative of the LIA has been appointed as liaison for the IMI System and is participating for the start of these proceedings. On the other hand, an exchange of information is also done with the Portuguese, French and Polish and Romanian Labour Inspectorates, through the channels established by Bilateral Agreements.

The Law 15/1999 of Protection of Personal Data (which transposes into our internal legislation the Directive 95/46/EC), is applicable all the registered data (coming from inspections) in any physical mean, treatable and to any mode of further use of those data by public and private sector. These data are subject to control by the Data Protection Agency and LIA has the role of Processor and Controller, who has notified the automatic processing of personal data relating to the internal system of Labour Inspectorate (“INTEGRA”), to the Spanish Agency for Personal Data.

Legal persons are not protected by the Spanish Legislation in this matter and data communication does not require the consent of the person concerned whereas the transfer is authorized by a law.

As to the data relating to the commission on administrative or criminal violations, basic and middle-level security measures must be implemented. All the files which contain data related to administrative or criminal sanctions must accomplish the measures provided for the medium level security measures. The third chapter of the RD 1720/2007 (the regulation which develops the Data Protection Act) defines what the middle-level security measures are. They are, among others, the following: designate supervisors; an external or internal audit of the system; support and document management; identification and authentication mechanism-to limit the possibility of repeated attempts unauthorized access to the information system-; physical access control; logging.

According to the above mentioned Data Protection Act, the personal data, collected or developed by public authorities for the performance of their duties, shall not be disclosed to other public authorities to exercise different skills or competencies that relate to others matters, unless the communication has been provided by the provisions file creation or provision of superior rank to govern their use, or where communication is intended to further processing of data for historical, statistical or scientific reasons.

SECTION 3 “MUTUAL ASSISTANCE IN INVESTIGATION OF BREACHES”

Experiences on cross-border collaboration and mutual assistances

Emphasis should be put on the following real cases:

1. Collaboration with the French Labour Inspectorate in a transborder construction site

Spanish and French Labour inspectorates collaborated in a railway tunnel construction site between both countries with periodical meetings to exchange information about companies and workers on the fulfilment of OSH legislation duties.

2. Collaboration with the Portuguese Labour Inspectorate on the control of subcontracting companies of the Construction Industry

Request for information was issued to the Portuguese Labour Inspectorate about the real activity of a company in Portugal, about the wages that the Portuguese workers really received when they work in Spain and spontaneous information about the social security contributions that the Portuguese companies should pay in Portugal according to the paid wages.

3. Request for information to the British OSH Inspectorate on Vessels

A Spanish worker suffered a work-related accident in a British-flagged vessel in which there was an alleged violation of safety and health at work.

The worker was registered in the Spanish Social Security System and therefore if it was found a breach of OSH legal rules he might be entitled to ask a surcharge in the social security benefits through a proposal of the Spanish Labour Inspectorate.

A report on the accident to the British authorities was requested. They replied that it was not possible to release their reports because they were confidential. Therefore it was not possible to carry out legal actions by the Spanish Labour Inspectorate.

4. Request for information to the French Labour Inspectorate about a work-related accident suffered by Spanish workers posted to France

Some Spanish workers of a subcontracting company suffered professional illnesses due to the exposure to chemical agents in a French workplace. When they returned they made a complaint to the Spanish Labour Inspectorate. As a result the Spanish Labour Inspectorate requested information to the French Labour Inspectorate.

The French Labour Inspectorate reported back that professional diseases were investigated by Labour Inspectors of the Department and they had done an Infringement Notice (Procès Verbal) against the main contractor and the process was following up by a penal court.

Affected workers were informed about this judicial process to facilitate their participation in it.

5. Collaboration with the Czech Labour Inspectorate to enforce fraud in posting of workers

In 2008, the Inspection of Balearic requested information on a company located in Czech Republic which posted workers to Spain without a real activity in the Czech Republic.

The proceedings were conducted through letters between the two authorities introspected of both countries. Czech Inspectors could verify (hearing witness and visiting the company address) that it was a letter-box company without real activity. Problems were the slow progress in the arrangements.

6. On a regular basis, collaboration is provided to other Member States to verify whether a company does exist or not

Transmission of enforcement information on OSH to other countries

For the exchange of information with other SLIC Members by electronic means the Spanish Inspectorate is currently using the KSS system and a representative of the LIA has been appointed as liaison for the IMI System and is participating for the

start of these proceedings. Furthermore the Spanish Labour Inspection exchanges information with the Portuguese, French, Polish and Romanian Labour Inspectorates through the channels established by Bilateral Agreements.

Pursuant to Article 10.4 Labour and Social Security Inspection Act “the Inspectorate of Labour and Social Security may provide assistance and cooperation to the authorities of the European Union with equivalent competence”.

Due to Article 14.1 Labour and Social Security Inspection Act “similarly, the Inspectorate of Labour and Social Security may take actions by checking data or records held by public authorities. To this effect, it could be appraised the backgrounds, data or information that could be provided by other public administrations of the European Union”.

The Spanish Labour Inspection has notified the automatic processing of personal data relating to the internal system of Labour Inspectorate “INTEGRA” to the Spanish Agency for Personal Data Protection. This information is available in the website of the Agency⁴.

Bilateral agreements

These Agreements are not equivalent to International Treaties and therefore they must be considered as a cooperation instrument.

These agreements foresee procedures of request for mutual assistance in the following cases:

- In the working conditions of the posted workers
- Exchange of information on OSH matters
- In cases of work-related accidents of the national workers
- Identification of undertakings or companies
- Determining the validity of labour and social papers
- Collaboration to notify documents

It is foreseen that preferably the procedural documents will be sent by electronic means. Requests should be motivated; they could entail inspection visits and additional checks and investigations.

In cases of work-related accidents of national workers a spontaneous exchange of information between LIA is foreseen in these agreements.

Special hearing procedures for witnesses are not foreseen.

Although joint investigation teams in specific cases are not foreseen it must be noted that in the frame of the ACCEPT program, several joint visits have been carried out by both Portuguese and Spanish Inspectors.

With regard to specific rules for data protection these agreements have a reference to the National legislation on this matter.

Records of fines or penalties imposed in the last years to other MS’s companies which have not been collected.

The LIA has not any record about the recovery of fines. Fines are imposed by the Labour Authorities of the Autonomous Communities and their recovery is carried out by the Tax Administrations.

Convention of 29 May 2000 on Criminal Matters

It is considered that the administrative fines which can be appealed before other courts than penal courts are out of scope of this Convention.

This Convention is applicable to the relationships between Spain and other EU Members which have signed it. In this sense a declaration of the Spanish Ministry of Foreign Affairs was published in the Official Journal of October 15th 2003 . It is considered that this Convention is in force since October 6th 2003.

There is not any exception, reservation, declaration or protocol.

According to the statement provided for in article 24 of the Convention, the authority or authorities that are competent for the purposes of articles 3 (1) and 6 (1, 2 and 6) of the Convention are the following:

Under Article 24.1.b, Spain designated as Central Authority the Ministry of Justice (Directorate General for Legislative Policy and International Judicial Cooperation).

Under Article 24.1.e) and a) the meaning of Article 18 and Article 20 the competent Authority is the National Court when Spain is serving as State.

As concerns paragraph 4 of Article 20 concerning the designation of contact points to provide services 24 hours a day, the contact points of Spain are the trial courts and the Central Criminal Court on duty.

With regard to transmission of requests for mutual assistance there is not any condition on Article 6 and with regard to spontaneous exchange of information (article 7) there is not any condition on Article 7.

SECTION 4. INTERNAL PUNISHMENT PROCEDURES

In Spain, internal punishment procedure has always an “Administrative Nature”: The RDL 5/2000 includes all the behaviours and conducts that may be subjected to an administrative contravention and fine. These are within the scope of the Labour Inspectorate.

When the Labour Inspector verifies, after conducting all the investigation, that an infringement or contravention to the social legislation (including OSH), under his or her scope, has been committed, he or she draws up a formal report deciding whether to deliver an improvement notice, or an Infringement or Contravention Notice including a proposal of fine to the company which is addressed to the Labour Authority. This Notice initiates the administrative contravention procedure. And the contravention notice can be contested by the offender. Later on, this resolution of the Labour Authority can be appealed before the superior body of the Autonomous Community administration (Labour and OSH matters) and the final administrative resolution can be appealed to the specialized Courts in administrative affairs (“Tribunales Contencioso – Administrativos”)

In the other hand, the Public Prosecutors can initiate a penal judicial procedure based in the Labour Inspector Notice when they have been aware of it (cases in which this communication should be done are determined in the “Technical Criteria” of the L.I.A., and that paralyzes the administrative procedure.

The Penal Spanish Code foresees offenses that are within the scope of The Public Prosecutor (usually cases of fatal-work accidents with non compliance with OSH legislation), this process usually begins after an infringement notice of LIA.

Administrative proceedings

Administrative fines can be imposed to companies whatever their nature is: legal or physical persons or even to “Property Communities” which does not have legal personality and responsibility lies exclusively on the employer or, in some specific cases, on the main contractor in direct or joint liability (Article 24.3 of the Act on Prevention of Occupational Hazards Act -Ley 31/1995- and Article 42 of the RLD 5/2000 (LISOS) foresee the joint responsibility of the main contractor in all the OSH contraventions if he is carrying out the same type of activity.

Fines could be imposed in a range of 40 to 819.780 €. In OSH field, contraventions are legally classified in minor (from 40 to 2045 €), serious (from 2.046 to 40.000 €) and more serious (from 40.000 to 819.780 €).

In case of a non- payment, within the Ministry of Taxes and Finance, the Department of Tax Enforcement will be the competent authority to enforce and execute administrative fines (Tax Offices of the Autonomous Communities are competent to execute fines, especially on OSH matters).

Criminal proceeding

Labour Inspectors do not participate in judicial proceedings matters. They can also be requested during the trial as prosecution witness or expert.

SECTION 5 “MUTUAL ASSISTANCE AND MUTUAL RECOGNITION IN FINANCIAL PENALTIES”

The principle of territoriality

Article 23.1 of the Organic Law of the Judiciary Power states that the criminal jurisdiction shall be competent on crimes and offenses committed in Spanish territory or committed aboard Spanish ships or aircraft, without prejudice to the provisions of international treaties to which Spain is party.

Article 23 (paragraphs 2nd, 3rd and 4th) of the Organic Law of the Judiciary Power states that the criminal jurisdiction will be competent on the acts described in the Spanish penal laws as crimes, although they have been committed outside national territory, provided that the criminals responsible were Spanish or foreigners who have acquired Spanish nationality after the commission of the act and the following requirements concur:

- That the act is punishable at the place of execution.
- The victim or the prosecutor submits report or complaint before Spanish courts.
- That the offender has not been acquitted, pardoned or punished abroad, or completed a sentence.

Offences on OSH are not included in that list and therefore it is not possible the intervention of the Spanish courts in those matters.

As it was said at the meeting, there are not records about enforcements of LIA’s sanctions in another Member State. If the international certificate fails, notification hangs on the bulletin board of the respective Embassy or Consular Section. Notification is normally made by mail letter.

The European Convention number 094 on the Service Abroad of Documents relating to Administrative Matters (Strasbourg, 24.XI.1977) has been ratified by Germany, Austria, Belgium, Spain, France, Italy Luxembourg and Portugal, but has never been used in Labour Inspection Procedures.

The FWD 2005/214/JHA

Transposition to Spanish legislation of FWD 2005/214/JHA, was done by Law 1/2008, December 4, for the implementation of the decisions imposing penalties in the E.U., but in principle the participants in the meeting thought that it is required that the decision could be appealed before courts with competence in criminal matters in that State.

Therefore this Law, would not be applicable to punishment procedures of the Member States which have similar procedures to the Spanish LIA

Competent Authority according to article 4 of the Law 1/2008 are:

- 1) The competent criminal court for implementation in Spain shall have jurisdiction to pass a resolution requiring the payment of a fine imposed on a person or entity that has property or income in another Member State of the European Union.
- 2) Criminal Judges of where properties are sources of revenue or the habitual residence of the person or the office of the legal person who bears the financial penalty will be the competent authorities to perform in Spain a resolution requiring the payment of a financial penalty.

The certificate must be translated into the official language or one of the official languages of the State.

In case of OSH fines, imposed in another M.S. implementation is possible if they are imposed by penal courts or their administrative decisions can be appealed to penal courts.

Grounds for not recognition are those listed in article 14 of the transposing Law (art 7 of F.W.D.2005/214JHA).

The Directive 2010/24 EC

According to with what was pointed out by the Spanish representative of the Ministry of Finance at the “Cibeles meeting of Madrid”, the scope of the Directive 2010/24 EC involves all public incomes and “duties of any kind”, except Social Security contributions and other concepts foreseen in the Directive. Therefore administrative fines concerning OSH are also included, except those which can be executed through the FWD 2005/214.

However, the term “duty” in this Directive is relating to public incomes but not directly to other public duties as e.g. those relating to occupational health and safety. Consequently, it is dubious the application of this Directive to execution of fines on OSH or posting matters.

CONCLUSION

Participants at the Madrid Cibeles meeting, highlighted in their expositions several main ideas, and gave some recommendations on ways of improving border control, in order to facilitate the enforcement of OSH penalty imposed by one M.S. to a company from another M.S.

- 1) To improve the use of existing data base (for ex., social security data base A 1), and maybe considering the necessity of adding other data to these forms.
- 2) To use the posting communications to establish a new data base.
- 3) In the Spanish case, with the particularity of its administrative procedure, it was of great interest what has been said by the Ministry of Finance participant at the Cibeles meeting held in Madrid, about the inclusion of administrative fines imposed in OSH matter, on the Scope of Directive 2010/24 EC.

And above all we have to fight against undeclared work that implies usually for the concerned employees, a lack in their safety at work conditions.

4 General Report on the CIBELES Project

1. INTRODUCTION

In this report we shall summarize the main aspects of the national reports through a comparative and global analysis that will help to promote the conclusions and proposals of the project shown in the next chapter.

Cross-border enforcement activities of the European Labour Inspectorates, especially in the domain of the Occupational Health and Safety, are usually developed in three steps:

- a) **Before the inspection:** Inspectors should have access to sources of information about the companies, workers and workplaces that are active in the scope of their competences. This information is always necessary in the design and planning of inspection activities. In the first section of the national reports we have specifically analysed what kind of information is available to Labour Inspectors relating to posted workers.
- b) **During the inspection:** Inspectors need **mutual assistance** and support in their inspection tasks in obtaining information for the investigation of breaches. They may receive information from other European Inspectorates or cooperate with them to achieve it. Sections 2 and 3 of national reports have analysed this aspect.
- c) **After the inspection activities:** regulatory authorities need **to enforce fines** imposed for breaches committed by posted companies even when these fines can only be enforced abroad, usually in the country of origin. Sections 4 and 5 of national reports have analysed this aspect.



2. SOURCES OF INFORMATION FOR LABOUR INSPECTION ACTIVITIES

Cross-border enforcement activities in OSH-related matters should be based on previous information available to the Labour Inspectors on companies, workers, workplaces, etc. This information is essential to the design and planning of inspections.

There are, in principle, two types of information necessary for this purpose. First, the alerts on OSH issues: information about products, dangerous agents, companies, etc., which other Labour Inspectorates can transmit; and secondly information about European posted workers and companies which are not usually registered in the host country.

2.1. ALERTS ON OSH MATTERS

Alerts on OSH matters is a type of spontaneous information which can be analysed as a form of mutual assistance in the investigation of breaches from the point of view of the issuer and as a source of information from the point of view of the recipient.

We have preferred to analyse it as a form of mutual assistance in the investigation of breaches and for that reason we include it in the next section.

2.2. INFORMATION SOURCES ON POSTING WORKERS

With regard to information on posting workers we are going to assess three aspects.

- The information of posting through different media
- The notification of work-related accidents and occupational diseases of posted workers
- The need for an instrument to identify posted workers

2.2.2. INFORMATION AND STATISTICS ON POSTING

When companies are going to post workers to other European countries they must submit a posting declaration to the authority in the host country indicating the worker's identification data, the workplace and the duration of posting and request the A1 form from the Social Security Institutions of their own country. This is to ensure that their workers remain under their legislation during the posting.

a) The declaration of posting

All the participating countries in the Cibeles Project except Hungary and Italy, that are preparing rules to regulate this matter¹, require posting companies to submit a prior Declaration of Posting.

Belgian legislation and information systems deserve special attention since a complete and integrated information system (LIMOSA) has been developed by the public administration in order to control the posting of workers together with other instruments to control posting companies (GOTOT-IN, DIMONA, DMFA, GENESIS, OASIS and DUC)².

Portugal and Austria share a common database with the tax administration that can be consulted by Labour Inspectors³.

¹ Report on Italy (Section 1).

² Report on Belgium (Section 1).

³ Report on Austria (Section 1); Section 8 Report on Portugal (Section 1)

In Austria, foreign employers are required to report to the Central Coordination Office for the Control of Illegal Employment. The report should be accompanied by an A1 form (formerly E 101 form) that proves to the authorities of Austria that the posted worker is covered by social insurance. The Central Coordination Office for the Control of Illegal Employment passes a copy of the report on to the competent health insurance institution and to the Public Employment Service⁴.

In other Cibeles countries there is no database on declarations of posting and therefore there are no comprehensive statistics available.

France is preparing a similar system of information to that of Belgium⁵. In Germany, according to the Posting Act, the Declaration on posting workers is only needed in those sectors where a minimum wage has to be complied with but there is no database⁶. In Spain declarations of posting should be submitted to the regional labour authorities and there is no database at regional or national level⁷.

With regard to the content of the posting declaration, a comparative study is shown in the Figure nº 1. As we can see, requirements can vary in every Member State and the common features are the deadline to submit the declaration which is always prior to commencement of the posting, the name of the posted company and posted workers, the workplace and the duration of posting. Other data as the activity of the posted company and the name of the contractor or client in the host country are required by the most of MS involved.

Figure 1: Declaration of Posting in Cibeles MS

DATA		BE	MT	FR	AT	DE	PT	ES
DEADLINE		prior	prior	prior	prior	prior	prior	prior
COMPANY DATA	Name, address	X	X	X	X	X	X	X
	Representative	X		X	X	X		
	Activity	X	X	X	X	X		
	Authorisation in the sending MS				X			X
	Identity Number	X		X				X
WORKERS DATA	Name, address	X	X	X	X	X	X	X
	Nationality	X	X	X	X			
	Age	X	X	X	X	X		
	Role	X		X				X
	Date of posting	X		X				
POSTING	Labour contract end date	X		X				
	Workplace	X	X	X	X	X	X	X
	Activity	X	X	X	X	X		X
	Contractor	X		X	X	X	X	X
	Duration	X	X	X	X	X	X	X
LABOUR CONDITIONS	Working hours	X						
	Location of documents	X				X		
	Use of dangerous agents		X	X	X	X	X	X
	Salaries			X				
	Collective Accommodation			X				

⁴ Report on Austria (Section 1)

⁵ Report on France (Section 1)

⁶ Report on Germany (Section 1)

⁷ Report on Spain (Section 1)

b) The registration of posted companies

Registration of posted companies in Spain has been provided by the rules derived from Law 32/2006 on monitoring subcontractation in the construction industry, for OSH purposes. All the companies of this sector should be registered, including posting companies, before the Labour Authorities and they must declare how OSH⁸ is organised and what training activities are undertaken.

c) The submission of the A1 Social Security form

Moreover, in most cases posting companies are required to submit a declaration of posting to the Social Security authorities of the sending Member State of each posted worker using the form A1 pursuant to Article 15.1 of the Regulation 987/2009 and Article 12 (1) of Regulation (EC) No 883/2004

This rule shall apply to a worker subject to the legislation of a Member State (sending State) by virtue of the pursuit of an activity in the employ of an employer and who is sent by that employer to another Member State (State of employment) in order to perform work there for that employer

These forms certify which legislation is applicable to posted workers. The other MS should recognise the validity of the document. In case of doubt regards validity or correctness of a document or where this is a difference of opinion between MS regards which legislation is applicable a dialogue and conciliation procedure should be followed up in the Administrative Commission for the coordination of Social Security Systems (Decision No A1 of 12 June 2009)⁹.

If the competent authority of the sending Member State does not deliver the A1 form the host country authorities are not able to recognize the implementation of the sending State's legislation on Social Security to posted workers and therefore may directly implement the national legislation.

All the countries involved in the Cibeles Project have implemented this legal obligation for posted companies but only in a few cases the does Labour Inspectorates have access to this information.

d) Conclusions

With regard to the declarations of posting, the Cibeles team experts agree these are useful in the design and performance of inspections to verify the working conditions of posted companies.

Their content should be have sufficient scope to allow Inspectors to monitor labour conditions. However, only in a few countries is there a requirement to report on labour conditions (working hours, dangerous agents or collective accommodation).

An idea would be to use the means of information provided in the Directive 91/533/EEC for the employment relationship as a good reference to establish a common basis of communications of posting at European level.

⁸ Report on Spain (Section 1)

⁹ 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

As a rule, the legal requirements under national legislations on documents and information regards posted companies have been considered acceptable by the European Court of Justice when proportionate.

The court judgment of 23 November 1999 in the joined cases C-369/96 and C-376/96 (Arblade) states in the paragraph (61) that “the effective protection of workers in the construction industry, particularly as regards health and safety matters and working hours, may require that certain documents are kept on site, or at least in an accessible and clearly identified place in the territory of the host Member State, so that they are available to the authorities of that State responsible for carrying out checks, particularly where there exists no organised system for cooperation or exchanges of information between Member States as provided for in Article 4 of Directive 96/71”.

Moreover, the paragraph (79) of the judgments states: “for the rest, 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.

The court judgments of 19 June 2008 in the case C-319/06 (Commission v. Luxembourg) and 7 October 2010 in the case C-515/08 state the same principle. Cooperation and mutual assistance to share information between regulatory authorities can lighten bureaucratic burdens for the companies.

The current situation regards information sources on posting could be summarized as follows:

- All the Cibeles MS, except Italy and Hungary, have mechanisms to control the arrival of posting companies but only three of them rely on a database and therefore have reliable statistics and acceptable tools for Labour Inspectors to monitor them.
- In most of the countries Labour Inspectors do not have access to the A1 Social Security forms.
- Therefore, the current information and communication systems on posting are ineffective and inefficient for both businesses and regulatory authorities. As the ECJ points out, effective mechanisms of cooperation, mutual assistance and sharing of information could solve this problem.

2.1. THE DECLARATION OR NOTIFICATION OF WORK RELATED ACCIDENTS AND OCCUPATIONAL DISEASES

Most of the Cibeles Member States, such as France, Austria, Malta Hungary and Italy, have regulated the obligation for posting companies to declare all the work-related accidents and occupational diseases that occur during the posting. In others countries, like Portugal, Belgium and Spain, posted companies are only required to communicate fatal and serious work-related accidents to Labour authorities.

Figure 2: Communication of work-related accidents and diseases by posted companies

	BE	MT	HU	FR	AT	DE	IT	PT	ES
Required to communicate all work-related accidents and diseases		X	X	X	X		X		
Required to communicate fatal and serious accidents	X							X	X
Not required						X			

Posted companies should report work-related accidents and occupational diseases to the competent Social Security institution of the country of origin and also, in most cases, the Labour authorities of the host country. The first notification is necessary to determine benefit entitlements and the second has been established to enable Labour Inspectors to investigate OSH conditions.

Currently, Social Security institutions are usually notified in order to obtain benefits, but the Labour authorities are not always notified.

To avoid fraud, double bureaucracy and underreporting it has been ruled in many countries that both notifications should follow the same procedure or that there should be a link between them. This kind of procedure could be implemented for posted companies at European level.

2.2. INSTRUMENTS TO IDENTIFY WORKERS

Labour Inspectors also need to identify workers in the workplace. The instruments we usually use are national identity cards, passports and the A1 form. However, Labour Inspectors are not able to verify the authenticity of these instruments.

In some Member States Labour Inspectors have detected fake A1 forms and for that reason it is especially difficult to combat absolute fraud in posting: workers who are established permanently in the host country.

A solution to this problem of the lack of identification tools can only be solved at European level using other already existing identification tools or by creating new instruments for this purpose.

3. MUTUAL ASSISTANCE IN THE INVESTIGATION OF BREACHES

3.1. FACTORS WHICH DETERMINE THE NEED OF MUTUAL ASSISTANCE

Mutual Assistance can be determined by several factors. First, cooperation demands to take into account the competences of the requesting and requested public bodies, and secondly, the need of cooperation depends on the scope of the national legislations. We are going to analyse them.

A) SCOPE OF COMPETENCES OF THE LABOUR INSPECTORATES

The **scope of competences of European Labour Inspectorates** varies considerably and their only common activity is Occupational Health and Safety (OSH). However, Malta

is the only Member State of the Cibeles project in which OSH is the unique inspection activity. The Inspectorates from Austria and Germany also are competent on working time and the remaining Inspectorates (Belgium, France, Hungary, Portugal, Italy and Spain) have a general competence in Labour matters (wages, labour basic rights, etc.), even Spain and Italy also in Social Security matters.

Figure 3. Competences of the Labour Inspectorates included in the Cibeles Project

	BE	MT	HU	FR	AT	DE	IT	PT	HU
OSH	LI-OSH	OSHA-LI	LI-OSH	LI	LI	LI BGS	LI ASL	LI	LI
WORK TIME	SLI	DEP. EMPLOYM	LI	LI	LI	LI	LI	LI	LI
WAGES	SLI	DEP. EMPLOYM	LI	LI	TAX ADM	TAX ADM	LI	LI	LI
ILLEGAL WORK	SLI	EMPLOYM. & TRAINING CORP	LI	LI	TAX ADM	TAX ADM	LI SSI	LI	LI

This map can be even more complicated if we consider that the powers of each Inspectorate on a given subject may not be unique. In Germany¹⁰ and Italy¹¹ the Labour Inspectorates are not the only public body competent on OSH matters. In others, like Belgium¹² and Hungary¹³, the Labour Inspectorate is divided in separated sections for OSH and for other social or labour matters, etc. Therefore the links for cooperation and mutual assistance between labour inspectors could vary depending on these circumstances.

A future legal framework should be flexible and provide for all these issues adapting Mutual Assistance to different situations for allowing it whenever is feasible through multilateral or bilateral agreements which complete the legislation.

On the other hand, Mutual Assistance requires that the powers of investigation of the collaborators are similar. We have found that the Labour Inspectors powers are basically those provided in 81 ILO Convention.

Figure 4 Labour Inspectorates powers

	BE	MT	HU	FR	AT	DE	IT	PR	ES
Visit workplaces	X	X	X	X	X	X	X	X	X
Summon	X ¹⁴	X	X	X ¹⁵	X	X	X	X	X
Requeriiments on private entities						X	X	X	X
Improvement Notice	X	X	X	X	X	X	X	X	X
Stoppage	X	X	X	X	X	X	X	X	X
Initiate Infringement Procedure	X	X	X	X	X	X	X	X	X

¹⁰ Report on Germany (Section 2)

¹¹ Report on Italy (Section 2)

¹² Report on Belgium (Section 2)

¹³ Report on Hungary (Section 2)

¹⁴ In Belgium, summoning companies and workers to LI office can is only possible on a voluntary basis

¹⁵ In France, Labour Inspectors can summon employers when they have not found them in the workplace

Pursuant to ILO Convention No 81 inspection activities to investigate breaches are usually carried out by their own initiative or by complaint **within administrative proceedings**. Only exceptionally, in some MS, can these be pre-trial investigations conducted by the **judicial** authorities.

Even Article 17 paragraph 2 of the Convention states, “it shall be left to the discretion of labour inspectors to give warning and advice instead of instituting or recommending proceedings”.

In conclusion, Labour Inspectorates do not have the same competences but they have basically the same powers to investigate breaches. **Mutual assistance should be usually carried out between Labour Inspectors with the same powers of investigation and as part of an administrative proceeding to investigate breaches.**

B) SCOPE OF NATIONAL LEGISLATIONS AND THE PRINCIPLE OF TERRITORIALITY

On the other hand, mutual assistance in enforcement procedures may also depend on what the scope of the national legislation is. Usually the host country requests assistance of the sending country with regard to posted companies and workers but the authorities of the country of origin to may request the assistance of the host country if their legislation is also applicable to national posted companies when they are abroad.

In all European countries, pursuant to article 3 of the Directive 96/71/EC, the national OSH legislation is always applicable to all kind of companies that perform their activities within their territory, whatever is the origin of the mentioned companies.

However, in some countries, like France¹⁶, Italy¹⁷ and Portugal¹⁸, the legislation allows the prosecution of breaches on OSH committed by national persons abroad, and in Spain¹⁹ criminal prosecution is not possible but the Labour Inspectors can request the employer who has posted workers to an EU country for a particular liability on work-related accidents and occupational diseases (surcharge on benefits) according to the Social Security legislation when the Spanish legislation in this matter is applicable to posted workers.

Therefore OSH breaches are committed abroad by posted companies these can be prosecuted by the Authorities of the MS of origin and the authorities of the country of origin can also request mutual assistance. In these cases Mutual Assistance needs could be even reciprocal.

Another important matter regarding territoriality would be to determine what the applicable legislation is. Specifically, the application of certain OSH rules of the sending country to certain activities preformed in the host country, especially on services such as medical surveillance, occupational health and safety services and training whose effects go beyond the duration of posting.

Fabienne Muller considers that the rules of the host country “only apply if the undertaking is not already bound by the rules of the State where it is based. It is

¹⁶ Report on France (Section 4)

¹⁷ Report on Italy (Section 4)

¹⁸ Report on Portugal (Section 4)

¹⁹ Report on Spain (Section 4)

therefore immediately evident that part of the exchange between administrations will consist of ascertaining whether certain rules exist and if they are comparable (occupational medicine, financial guarantees). If so, the legislation of the host State is not imposed upon the undertaking²⁰.

We do not have European legislation on this matter and only some countries of the Cibeles Project have provided legislation about it. Italy²¹ has provided that the obligation on information and training on labour conditions correspond to posted companies and France²² has legislated establishing the recognition of the health services provided in the European country of origin²³ when they can be considered equivalent.

In summary, we can conclude:

- Mutual assistance needs are determined by the scope of competences of Labour Inspectorates. OSH is the common competence and therefore regulations should be referred to it. However, other mechanisms should allow mutual assistance on different matters.
- The territorial scope of national legislations can shape mutual assistance. When the legislation of the sending country is applicable in host country the request for information should be mutual.
- In any event, it is important to clarify what the applicable legislation is, especially OSH services such as medical and training whose scope could be broader than the national borders.

3.2. MUTUAL ASSISTANCE FORMS

Mutual Assistance entails a double aspect, a European Network among Member States public bodies and also an Internal or National Network among every Member State public bodies. In order to achieve the goals of enforcement and technical cooperation compliant with data protection requirements the information should flow through different regulatory authorities according to regulations.

Mutual assistance forms among Labour Inspectorates are defined under bilateral agreements and current relationship practices through the use of the tool KSS (Knowledge Sharing Systems) and the deals and exchanges between the authorities from different Member States, frequently in an informal way.

The current mutual assistance forms used by the Labour Inspectorates are, in summary, those related to exchange of information (requests, spontaneous information and technical cooperation), the hearing of witnesses in the investigation of breaches (especially in the investigation of work-related accidents and diseases), joint teams for enquiries (for common breaches or technical cooperation) and administrative support in procedures (to notify acts, attend judicial processes and execution of fines).

²⁰ Fabienne Muller

²¹ Article 3.6 Legislative Decree 81/2008: Nell'ipotesi di distacco del lavoratore (...) tutti gli obblighi di prevenzione e protezione sono a carico del distaccatario, fatto salvo l'obbligo a carico del distaccante di informare e formare il lavoratore sui rischi tipici generalmente connessi allo svolgimento delle mansioni per le quali egli viene distaccato.

²² Article R-1262-10 of the Labour Code: Le salarié détaché bénéficie des prestations d'un service de santé au travail, sauf si l'employeur, établi dans un Etat membre de l'Union européenne, partie à l'accord sur l'Espace économique européen ou dans la Confédération helvétique, prouve que ce salarié est soumis à une surveillance équivalente dans son pays d'origine.

²³ This topic has been analyzed in the "Comparative study on the legal aspects of the posting workers in the framework of the provision of services in the European Union", Aukje van Hoek & Mikje Houwerzijl. Paragraph 3.7 pages 80 and 81

We shall analyse these below:

3.2.1. EXCHANGE OF INFORMATION

A) REQUEST FOR INFORMATION

The request for information is the most common form of Mutual Assistance between Labour Inspectorates. The Inspectorate that needs information or data about an enquiry requests it from the other Inspectorates.

One of the most common utilities of the KSS (Knowledge Sharing System) has been the exchange and request for information on “products” relating to OSH machinery, equipment and dangerous agents being used by companies.

The most of the bilateral agreements signed by the Labour Inspectorates involved in the Cibeles Project are referred to posting of workers. In many cases the requests for information are relating to the investigation of breaches committed by European companies during the posting on all the matters described by Article 3 Directive 96/71, such as in Bilateral Agreements signed by Belgium, France, Spain and Portugal.

Other agreements have reference to information about the activities of the posting company in the country of origin, the posted workers from third countries and the validity of the papers²⁴. In summary anything which may be susceptible to fraud in posting.

These requests usually involve the information available to the requested Labour Inspectorate and also the information that can be obtained through research or investigation of the Labour Inspectors of the recipient country.

Some agreements establish the ways to request for information through central or regional offices (Portugal, Spain and France), the use of electronic means (Belgium, France, Spain, Portugal) and a date by which to receive a complete response in 4 weeks (Belgium and Portugal).

B) SPONTANEOUS INFORMATION

Spontaneous information is usually related to offences and the infringements of rules of law whose punishment or handling of which is the competence of the authority of another Member State at the time the information is provided.

On OSH this usually occurs when the applicable law to the infringement verified by the host country authorities is the sending country legislation. It could happen with certain services provided in the country of origin such as medical surveillance, training, etc.

The bilateral agreements provide spontaneous information about:

- Occupational health and safety services of the country of origin,
- When the national companies have committed violations in the host country, especially in posting matters (Spain and Portugal)
- When there are work-related accidents which affect national workers (Spain and Portugal), or to promptly communicate news concerning national legislation in the field (Italy).

²⁴ Bilateral agreements between Spain and Romania and Spain and Portugal

In the use of the KSS spontaneous information has taken place in alerts or general information about products, equipment, agents or substances that can affect the practice of all the Labour Inspectorates.

C) TECHNICAL COOPERATION: THE KNOWLEDGE SHARING SYSTEM (KSS)

The KSS is a real and useful instrument for communications currently used exclusively by SLIC members, which is focused on exchange of technical information, especially on OSH, and without using personal data.

As we have mentioned before, the principles of data protection should not apply to data rendered anonymous in such a way that the data subject is no longer identifiable. Therefore it is not really necessary a legal regulation.

However, there are some issues to be taken into consideration, with regard to KSS. The first is the voluntary basis. It is not mandatory to deliver and respond to requests and there are some occasions, such as alerts on OSH or other issues, when it may be very convenient.

On the other hand, in principle, KSS cannot be used by MS for enforcement activities and procedures unless they were covered by internal legal rules or other legal instruments. It is also necessary to take into account that personal data protection can also involve to legal persons in many countries and such information could not be disseminated without a legal cover. Some Labour Inspectorates are in fact deterred from using this information system for this reason.

Therefore a legal regulation is needed for all exchanges of information in order to ensure legal certainty for the users.

The exchange of information on National legislation, on products such as machinery, dangerous agents, etc., on inspection procedures on OSH matters and the exchange of reports and studies on topics relating to inspection have been usually contained **in most of bilateral agreements** signed by Italy, France, Portugal and Spain²⁵.

In some cases a “**Vademecum**” has been produced on how the Inspector should interpret and handle the labour documents of the other signatory country (Italy and Romania, Spain and Portugal). This practice could be extended to other countries.

3.2.1. FORMS OF COOPERATION

Other forms of mutual assistance are physical and active forms of cooperation between Labour Inspectors.

A) HEARING OF WITNESSES

The hearing of witnesses is necessary in the investigation of breaches when the posting company has left the host country or the actions have been taken in another country, especially when it is necessary to reconstruct the facts occurred on the occasion of a work-related accident.

Only the bilateral agreement between Austria and Germany provides for this form of mutual assistance²⁶.

²⁵ Fabienne Muller

²⁶ Article 5 of the Bilateral Agreement

B) JOINT TEAMS FOR ENQUIRIES

The establishment of transnational working groups of Inspectors has been a common practice in the following cases:

a) Coordination in cross-border sites

It has been necessary to coordinate the actions of the Labour Inspectors in trans-border workplaces like tunnels, bridges, etc. In the Cibeles countries there are documented experiences in Spain²⁷, France and Italy²⁸.

b) Control of companies acting simultaneously in several countries

On other occasions Labour Inspectors from different countries have constituted joint teams for complex investigations in several countries looking into the same companies or the same type of companies.

The bilateral agreement signed by Belgium and France on undeclared work provides for the setting up of a cross-border working group and there are more examples of joint team actions between Inspectorates²⁹.

c) Control of Transports

In the control of transports circulating across several countries there is currently a project of partnership among France, Romania and Italy for road transport sector and posting of workers³⁰.

d) Joint teams with sending and host country inspectors

Inspectors of the host country can be present in investigations carried out by the Inspector of the country of origin about breaches committed in the host country. E.g. Investigation of a work-related accident

Inspectors of the country of origin can be present during the investigations carried out by Inspectors of the host country on companies posted.

Bilateral agreements signed Italy and Romania, among others, provides for this kind of coordinated controls.

e) Joint teams for cooperation in European or transnational campaigns

Many bilateral agreements provide for the exchange of experiences and inspection methods between Labour Inspectors from different Member States (France, Portugal, Italy, Spain).

In Europe Labour Inspectorates can collaborate as part of joint teams under the proactive European campaign designed by the SLIC.

C) SUPPORT IN ENFORCEMENT PROCEDURES

Lastly other forms of mutual assistance concern what can be done about punishment procedures already undertaken by the Labour Inspectorates.

²⁷ Report on Spain (Section 3)

²⁸ Railway construction site between Lyon and Turin (2010)

²⁹ Fabienne Muller

³⁰ Conference on Fundamental Social Rights and the Posting of Workers in the Framework of the Single Market, Brussels June 2011. "Awareness and action learning for administrative cooperation: the experience of transnational pilot projects involving Labour Inspectors". Deborah Giannini

a) Special Units or networks of experts in the Inspectorates

For the purpose of enforcement what is needed is the creation of networks of experts or central units in the Labour Inspectorates to tackle posting or OSH issues.

It is difficult for all Inspectors to be up to date on legislation and have sufficient practice on these matters and they usually need the technical assistance of specialized officers.

It is also difficult to set up steady mutual assistance relationships among regulatory authorities in enforcement matters to cope with complex issues that can affect several MS and companies. The setting up of special units can facilitate and promote these relationships. With regard to this question we should remark and take as a reference the experience of Belgium³¹.

However, these units or networks of experts usually function upon request in a reactive manner. It would be necessary to create a network to promote training and joint and proactive actions among Labour Inspectors from different MS.

b) Support in notification

Some Bilateral Agreements provide for the request for information about the address of a company in the country of origin for the purpose of notifying administrative acts (Spain and Portugal, Austria and Germany)

Another form could be the request to notifying to the addressee all documents issuing from the applicant Member State related to enforcement procedures.

The Bilateral Agreements between Spain and Portugal provide for the notification in a second step through the respective embassies.

c) Support in judicial procedures

Article 5 of the Bilateral Agreement between Austria and Germany is the only one that provides for this kind of cooperation.

Taking an example of the mutual assistance among tax administrations, article 7.1.c) of the Directive 2010/24 provides for the possibility to “assist the competent officials of the requested Member State during court proceedings in that Member State”.

d) Support in the execution of fines

This topic is subject of a closer analysis in paragraph 5.

3.3. FACTORS WHICH DETERMINE MUTUAL ASSISTANCE REGULATIONS

3.3.1. PERSONAL DATA PROTECTION

First, we should start from the premise that a legal regulation is required on matters, which entail the use of personal data as this occurs frequently in the context of mutual assistance in enforcement procedures.

³¹ Report on Belgium (Sections 1 and 2)

a) PERSONAL DATA AND 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.

In the traditional sense (Right to Privacy) it was essential to determine the nature of the information and whether or not this affected personal privacy. In a more modern context (Data Protection) the content of the data is irrelevant as long as there is a connection with a specific natural person pursuant to Council of Europe Convention 108, 28-1-1981. According to a definition issued by the German Constitutional Court in its ruling 15-12-1983, on the Census Act, it is *the right of the individual to decide what information about himself should be communicated to others and under what circumstances* (Recht auf informationelle Selbstbestimmung).

The principles and regulations on data protection should not apply to data rendered anonymous in such a way that the data subject is no longer identifiable.

However the scope of personal data protection can vary in each Member State because in some of them it can also involve legal persons and not only natural ones.

Figure 5 Scope of Personal Data Protection in Cibeles Countries

	BE	MT	HU	FR	AT	DE	IT	PR	ES
Directive Transposed	X	X	X	X	X	X	X	X	X
Protetion of legal persons			X	X	X	X	X	X	

As we can see in the figure 3 all the Cibeles countries have transposed the Directive 95/46/EC and the data protection of natural persons is ensured. In Hungary, France, Austria, Germany, Italy and Portugal the protection also involves the legal persons.

b) THE EUROPEAN REGULATIONS ON PERSONAL DATA PROTECTION

The first instrument to regulate personal data protection in Europe was the **Council of Europe 108° Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data**, approved in Strasbourg in 28.I.1981.

The European Commission approved a Recommendation of 29 July 1981 (81/679/EEC) in order to urge Member State to sign and ratify this Convention. The Commission considered that “the establishment and functioning of the *common market* in data processing calls for extensive standardization of the conditions obtaining in relation to data processing and, therefore, to data-protection at European level” and “approximation of data-protection is desirable so that there can be free movement of data and information across frontiers and in order to prevent *unequal conditions of competition* and the consequent distortion of competition in the common market”. This Convention has been currently signed and ratified by most of the EU Member States.

Fourteen years later came **Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data**. This Directive was approved “having regard to the Treaty establishing the European Community, and in particular Article 100a thereof” on **Internal Market**, subsequent Article 95 ECT (Amsterdam) and current Article 114 of the Treaty on the Functioning

of the European Union (TFEU). Directive 96/71/EC on posting workers was also within the scope of this pillar.

c) PERSONAL DATA PROTECTION IN CRIMINAL MATTERS

The EU Council Framework Decision 2008/977/JHA of November 27, 2008 regulates the protection of personal data processed in the context of police and judicial cooperation in criminal matters.

This Framework Decision has been approved under the third pillar, the old Title VI of the Treaty on European Union (TEU), current Title V of the Treaty on the Functioning of the European Union (TFEU): Area of Freedom, Security and Justice (Article 67 et seq. of TFEU).

Current article 67 lays down the purposes of this area:

- To ensure the absence of internal border controls for persons and a common policy on asylum, immigration and external border control.
- 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.
- To facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

All decisions and instruments adopted within this area are related to crimes and criminal procedures. The preamble of the FWD 2008/977/JHA lays down in paragraph (3) that “legislation falling within the scope of Title VI of the Treaty on European Union should **foster police and judicial cooperation in criminal matters** with regard to its efficiency as well as its legitimacy and compliance with fundamental rights, in particular the right to privacy and to the protection of personal data. Common standards regarding the processing and protection of personal data processed for **the purpose of preventing and combating crime** contribute to the achieving of both aims”. Paragraph (6) lays down more clearly that “this Framework Decision applies only to data gathered or processed by competent authorities **for the purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties**”.

Therefore, this Framework Decision does not involve Labour Inspection procedures that do not entail crimes and criminal offences pursuant to Article 67 TFEU.

d) THE TRANSMISSION OF PERSONAL DATA IN ENFORCEMENT ACTIVITIES

One of the core functions of a Labour Inspectorate is to collect data on the basis of which conclusions are drawn and legal steps are enacted. Most of these data refer to persons and they may be individuals or legal entities. Collection, processing, preserving and communication of these data may affect an individual right of the respect for the privacy of personal and family life. For the purpose of collecting data, labour inspectors are conferred special powers pursuant to Article 12 of ILO Convention 81.

The data collected and stored by Labour Inspectorates includes data on “identifiable natural persons” and this is considered in the majority of cases to constitute “processing of personal data”, even when the data is on paper and not in digital format.

Regarding the disclosure of personal data to third parties, article 8.a) of the Convention lays down that “any person shall be enabled to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file”. However, article 9.2.a) establishes that “derogation from the provisions of Articles 5, 6 and 8 of this convention shall be allowed when such derogation is provided for **by the law of the Party** and constitutes a necessary measure in a democratic society in the interests of protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences”.

In the same way, article 11 of the Directive lays down that information where the data have not been obtained from the data subject, the controller or his representative must at the time of undertaking the recording of personal data or if a disclosure to a third party is envisaged, provide the data subject with some information about the processing. However, this obligation “**shall not apply where disclosure is expressly laid down by law**. In these cases Member States shall provide appropriate safeguards”.

In conclusion, Convention n° 108 and Directive 95/46 establish a general legal framework for protection in processing personal data in public authorities’ actions and therefore it can also involve data transfers in mutual assistance on enforcement procedures.

However, these legal instruments do not provide for a specific regulation on mutual assistance but they are only establishing the rules and the limits for National legislations on data protection. One of these limits is that only **an express law** could allow the personal data transfer to third parties.

Therefore, each State should adopt specific legislation to allow personal data transfers in the course of enforcement actions for investigation of facts in order to observe the legal framework of the 108^o European Convention and the Directive 95/46/EC.

Other legal requirements are:

- Data must be processed for specified purposes
- On the basis of the consent or the law
- Everyone has the right of access and rectification
- Compliance should be subjected to control

The regulation on data protection at National level is the result of transposing the Directive 95/46/EC and at Community level, when the European Commission intervenes in the process of exchange, the Regulation 45/2001 in its Chapter IV must be fulfilled.

e) THE EUROPEAN DATA PROTECTION SUPERVISOR OPINION

We also should into account the opinion of the **European Protection Data Supervisor (EDPS) especially the one concerning the implementation of the Internal Market Information System (IMI) as regards the protection of personal data (2008/49/EC)**³².

³² OJEU C 270/01 25.10.2008.

The EDPS points out:

“(18) 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’).

(19) According to its Article 1, the IMI Decision specifies the functions, rights and obligations of IMI actors and IMI users in relation to data protection requirements. The EDPS understands from Recital 7 that the IMI Decision is meant as a specification of the general Community framework of data protection under Directive 95/46/EC and Regulation (EC) No 45/2001. It specifically deals with the definition of controllers and their responsibilities, data retention periods and the rights of data subjects. The IMI Decision, thus, deals with limitations/specifications of fundamental rights and it aims at specifying subjective rights of citizens.

(20) Based on the case law at 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.

(21) The issue of legal certainty is even more eminent since under the system of the EC Treaty it will be primarily the national judges who will have discretion to decide which value they attach to the IMI Decision. This might lead to different outcomes in different Member states and even within one Member State. This legal uncertainty is not acceptable.

(22) The absence of (security about) a legal remedy would be in any event contrary to Article 6 of the ECHR which provides for the right of a fair trial, and the case law on this Article. In such a situation, the Community would not fulfil its obligations under Article 6 of the Treaty on the European Union (‘TEU’), which requires the Union to respect fundamental rights, as guaranteed by the ECHR”.

The regulation should follow up these basic principles:

- **Defining purposes:** To define clearly the needs of collaboration and exchange of LI, especially on OSH
- **Proportionality:** Defining as much as possible the content of the requests and the answers: they 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
- **Limits to retention** of personal data of the exchanges
- Using **privacy notice**

Therefore the forms of mutual assistance for enforcement procedures need a prior legal regulation at European and National level to ensure their legal certainty.

Only when Mutual Assistance is required for mere technical support purposes and it is not necessary to deal with personal data on companies of any kind or workers it is not necessary to rely on legal regulations³³.

³³ About data protection in IMI System: Fabienne Muller .

3.3.2 THE LEGAL VALUE OF EVIDENCES OBTAINED BY OTHER INSPECTORATES

Another issue that also needs a legal regulation is that relating to the value of the evidences collected by an inspector from another Member State.

There is no mention in the current European legislation of this subject and only some national legislation regulates it, namely Belgium³⁴ and Spain³⁵.

The new Directive should also regulate the legal evidence value of exchanged information: to be used by inspectors in their enquiries, having the same value as their own “de visu” findings.

3.4. MUTUAL ASSISTANCE REGULATIONS

3.4.1. INTERNAL MARKET INFORMATION SYSTEM (IMI)

The mutual assistance between Labour Inspectorates through the Internal Market Information System (IMI) has a legal basis in **Article 4 of the Directive 96/71/EC on posting of workers**.

Pursuant to this article “Member States shall designate one or more liaison offices or one or more competent national bodies”. It could be set up a central or some regional liaison offices whose relationship should be ensured. The Directive does not define “their geographical area of action or their exact mission”.

“Member States shall make provision for a proactive cooperation between the public authorities which are responsible for monitoring the terms and conditions of employment referred to in Article 3”. The term “cooperation”, in a broad sense, could involve different forms of mutual assistance.

The article at issue states that “such cooperation shall in particular consist of replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities”.

IMI Regulations has a general Legal basis in Decision 2004/387/EC on Interoperable delivery of pan-European eGovernment services to public administration, businesses and citizens (IDABC). There are a series of Commission Decisions to specifically regulate each Directive, e.g. Decision 2008/ 49/EC.

A separate and specific application of IMI to be used as a pilot on posting workers has existed since March 2011.

The European Data Protection Supervisor (EDPS) delivered an opinion on the Decision 2008/49/EC (2008/C 270/01) pointing out the need for a proper legal basis for the provision on data protection to ensure legal certainty such as a separate legal instrument for IMI System since it affects a fundamental right (Art. 8 ECHR)³⁶.

The Commission approved the Recommendation 2009/329/EC on data protection guidelines for IMI in order to improve the application of the Decision 2008/49. Later the Communication from the Commission “a strategy for expanding IMI” (dated 21.2.11) the

³⁴ Report on Belgium (Section 3)

³⁵ Report on Spain (Section 3)

³⁶ See above paragraph 4.1.e) of this Chapter

Commission intends to submit a proposal for a European Parliament and Council Regulation in the first half of 2011 on IMI (horizontal).

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

However this system is only referred to a form of mutual assistance: 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 investigations to get it and then transmit it to the applicant.

3.4.2. THE EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

This Convention was approved by the Council Act of 29 May 2000 establishing, in accordance with Article 34 of the Treaty on European Union, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union³⁷.

The purpose of this Convention is to supplement the provisions and facilitate the application between the Member States of the European Union, of other rules, in particular the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

Pursuant to Article 3 “mutual assistance shall also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters”.

In the “Explanatory report” of the Convention³⁸ it is stated that “the inclusion of ‘in particular’ at the end of the paragraph makes it clear that the court before which the proceedings may be heard does not have to be one that deals exclusively with criminal cases.

This is to say that the court could deal with criminal, civil or administrative matters because in some Member States there are courts with competence in several matters. However, the core question is to know whether this article involves all the courts that deal with any kind of penalties or sanctions (be either administrative or criminal) or it is only referred to courts that deal with criminal sanctions (exclusively or not).

The Convention provides for several forms of mutual assistance but only the following could be used by Labour Inspectorates:

- Sending and serving procedural documents
- Transmitting requests for mutual assistance
- Spontaneous exchange of information
- Hearing by videoconference
- Hearing of witnesses and experts by telephone conference
- Setting up joint investigation teams

³⁷ OJEC 12.7.2000 (C 197/1) (2000/C 197/01)

³⁸ OJEC 29.12.2000 (C 379/07)

In the application of this Convention by the National Labour Inspectorates we should differentiate four groups of countries:

- a) Excluded from the application because the Convention has not been ratified as in Italy
- b) Clearly included because fines are always delivered by criminal courts, as in France and Malta
- a) Also included because fines are administrative but can be appealed before the criminal court, as in Germany³⁹
- a) Doubtfully included because fines are administrative but they can be appealed before other courts than criminal courts:
 - Before courts for administrative affairs, as in Austria and Spain
 - Before courts for labour affairs, as in Belgium, Hungary and Portugal

The position of these countries varies. The Labour Inspectorates of Austria⁴⁰ and Portugal⁴¹ consider this Convention applicable to their administrative punishment procedures whereas the Inspectorates of Belgium⁴², Spain⁴³ and Hungary⁴⁴ consider just the opposite.

3.4.3. NATIONAL LEGISLATIONS ON MUTUAL ASSISTANCE

Another possibility is that mutual assistance is regulated by national legislations. This is the case in Belgium, France and Spain and it is also provided for in a general clause of the administrative legislation of Hungary.

In Belgium Article 8 of the Labour Inspection Act provides for mutual assistance mechanisms among those countries that have ratified ILO Convention 81:

“With the services for labour inspection of other member states of the International Labour Organisation in which the Treaty number 81 concerning labour inspection in industry and commerce, approved by the law of 29 of march 1957, is valid, the social inspectors **can exchange all information that could be useful for the surveillance tasks each of them is charged with**”.

The **legal value of evidences** obtained is also regulated: “the information obtained from the inspection services of other member states of the International Labour Organisation is used in the same way as similar information obtained directly by the social inspectors”. “The information obtained for the benefit of labour inspection services of those member states are collected in the same way by the social inspectors as similar information gathered for the surveillance tasks they themselves are charged with”.

Also provided for is the setting up of **joint teams and the presence of inspectors in enquiries abroad**: “the administrations of which these social inspectors are part, can also, in application of an agreement concluded with the proper authorities of a member state of the International Labour Organisation, allow the presence of officers of inspection services

³⁹ Report on Germany (Sections 3 and 4)

⁴⁰ Report on Austria (Section 3)

⁴¹ Report on Portugal (Section 3)

⁴² Report on Belgium (Section 3)

⁴³ Report on Spain (Section 3)

⁴⁴ Report on Hungary (Section 3)

of this member state on the national territory in order to gather all information that could be useful for the surveillance task the latter has been charged with”.

The legal value of evidences is also regulated: “The information obtained abroad by a social inspector as a result of an agreement closed with a member state of the International Labour Organisation, can be used in the same conditions as the information gathered by the social inspectors in our own country”.

“In implementation of such an agreement the administrations to which the social inspectors, as mentioned in the first paragraph, belong can also proceed to other forms of mutual aid and cooperation with the labour inspectors of other member states of the International Labour Organisation”.

“The provisions mentioned in paragraphs one to six apply also to the agreements closed between the proper authorities in Belgium and the proper authorities of states that have not signed the Treaty number 81 concerning labour inspection in industry and commerce, approved by the law of 29 of march 1957. (Modified by law 20.07.06)”

In Spain, Articles 10 and 14 of the Labour and Social Security Inspection Act amended in 2009 provide that the Spanish Labour Inspectorate can provide support and information to other Labour Inspectorates from the European Union. Article 10.4 of the Law states: “the Inspectorate of Labour and Social Security may provide assistance and cooperation to the authorities of the European Union with equivalent competence”.

On the other hand, pursuant to article 14.1 of the Law the Spanish Inspectorate may receive support and information from other regulatory authorities of the European Union: “similarly, the Inspectorate of Labour and Social Security may take actions by checking data or records held by public authorities. To this effect, it can be appraised the background, data or information provided by other public administrations of the European Union” .

In France, Article of Low L1263-1 of the Labour Code provides the Labour Inspectors’ right to communicate information and documents to Labour Inspectors with similar powers of foreign states and the authorities responsible for coordination of their actions with those states. This article is the transposition of Article 4 of Directive 96/71/EC, which provides mechanisms for cooperation and information. A decree of the State Council provides the nature and conditions of these communications and the personal data protection

In Hungary, the article 27 of the Hungarian Administrative Procedure provides that the authorities of the Republic of Hungary may contact a foreign authority to request for legal assistance when there is a **reciprocity** agreement between the States.

In the assessment of reciprocity the position of the minister in charge of foreign policies shall be authoritative, and it will be formulated in agreement with the minister having competence in connection with the case on hand⁴⁵.

3.4.4. BILATERAL AGREEMENTS

Bilateral agreements are currently the most common regulation for mutual assistance between European Labour Inspectorates. However, their legal nature varies a lot.

These agreements could be set in the form of treaties approved by Parliaments and therefore they are legally binding rules or on the contrary they can be non-legally binding

⁴⁵ Report on Spain (Section 3)

⁴⁶ Report on Hungary (Section 3)

statements or declarations, a simple form of informal and good will cooperation without any legal basis on national or European regulations.

Their content also varies considerably. They can deal with the Posting Directive, the Social Security Regulations, on Enforcement procedures or the fight against the illegal or undeclared employment.

Sometimes these agreements are binding only for the institutions that sign the agreement, not for other institutions of the Member State. When there is not a full equivalence among the competences of the signatories it may be a problem to implement some of these agreements.

It is common practice in European Regulations and Directives on mutual assistance for providing a wider one⁴⁷. Bilateral agreements need a legal basis at European and national level and a Directive could provide it.

3.4.5. EUROPEAN CONVENTION 094

Eventually, with regard to the assistance in notification of administrative acts we have the European Convention 094 of the Council of Europe on the Service Abroad of Documents relating to Administrative Matters signed in Strasbourg, 24.XI.1977 and ratified several countries of the Cibeles Project as Austria, Belgium, France, Italy, Germany, Portugal and Spain.

There is no real experience of execution of this Convention by Labour Inspectorates.

On the other hand the request for information about the address of the posting company in the country of origin has been already included in the questionnaire of the IMI according to Article 4 of the Directive 96/71/EC.

Figure 6: Mutual assistance regulations

	BE	MT	HU	FR	AT	DE	IT	PT	ES
KSS	APPL. REAL EXPER.	APPL. NO REAL EXPER.	APPL. REAL EXPER.	APPL. REAL EXPER.	APPL. REAL EXPER.	APPL. REAL EXPER.	APPL. REAL EXPER.	APPL. REAL EXPER.	APPL. REAL EXPER.
IMI	APPL.	APPL.	APPL.	APPL.	APPL.	APPL.	APPL.	APPL.	APPL.
CONVENTION 2000 IN CRIMINAL MATTERS	APPL. FOR PENAL SANCTIONS. NOT FOR ADMINISTRATIVE SANCTIONS	APPL. NO REAL EXPER.	NOT APPLICABLE FOR ADMINISTRATIVE SANCTIONS	APPL. NO REAL EXPER.	APPL. NO REAL EXPER.	APPL. NO REAL EXPER.	NOT RATIFIED	APPL. NO REAL EXPER.	NOT APPLICABLE FOR ADMINISTRATIVE SANCTIONS
BILATERAL AGREEMENT	X		X	X	X	X	X	X	X
INTERNAL LAW	X		X						X
CONVENTION 094 CE	X			X	X	X	X	X	X

⁴⁷ E.g. Article 24.1 of Directive 2010/24/EU and Article 86 Regulation 883/04, Annex I of the Regulation 987/09

Figure 7 Mutual assistance needs and regulations

	KSS	IMI	CONVENTION 2000	BILATERAL AGREEMENTS	INTERNAL LAW	CONVENTION 094 CE
Alerts on products	X					
Alerts on companies		X	X	X	X	
Requests for information		X	X	X	X	
Hearing of Witness			X	X		
Presence in enquiries			X	X	X	
Joint teams			X	X	X	
Notification			X	X		X
Number of countries involved	All	All	5/9	7/9	3/9	7/9

In the figures 6 and 7 we analyse the Mutual Assistance regulations at European level.

We can see that as for mutual assistance pursuant to article 4 of the Directive 96/71/EC, only the request for information on posting companies and workers regulated at European and National level, involves all Member States.

Other types of mutual assistance are also provided for in the Convention on Mutual Assistance in Criminal Matters (2000) and the 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 MS and there is not yet any real experience on Labour Inspectorate actions. Therefore it is necessary to approve a new Directive to regulate all types of Mutual Assistance for Labour Inspectors.

Requests for information and spontaneous information should include in any case the right, and sometimes the obligation, for Authorities competent for posting directive to communicate trans-border with each other and to exchange information about findings and enquiries concerning posted workers, including personal data.

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

In order to avoid confusion and duplicities and facilitating legal certainty for Member States on data protection it is also necessary to regulate all the forms of mutual assistance above mentioned in a Directive. This regulation also should include the forms of technical cooperation among Labour Inspectors that are actually carried out by the KSS since personal data protection can involve legal persons in many Member States and it is necessary to ensure legal certainty in communications.

The scope of this Directive on enforcement could encompass all those matters included in Article 3 of the Directive 96/71/EC but also the need to cooperate in the enforcement of Community law as it is provided for in articles 153 and 156 TFEU.

This Directive should give legal base to bilateral (or multilateral) agreements that focus on the same scope of this “enforcement” instrument, but where parties go further in the reciprocal engagements.

4. FINES AND EXECUTION OF FINES

The analysis of mutual assistance on fines and enforcement thereof deserves particular attention.

On the one hand the nature of the punishment procedure whereby the Labour Inspectors are involved is different in each country. The legal status of Labour Inspectors can also vary depending on the nature of these proceedings and this fact can have consequences in a legal regulation at European level. The amount of fines and liability regime also demand an analysis.

On the other hand, the enforcement of fines in other Member States, usually in the sending country, is covered in a specific regulation at European level.

4.1. FINES ON OSH AND THE STATUS OF LABOUR INSPECTORS

All Labour Inspectorates have the power to initiate punishment procedures when they have checked breaches on social legislation on OSH matters. Some Inspectorates included in the Cibeles Project can also initiate punishment procedures in other matters relating to the posting of workers: wages, working time, social security and illegal work.

a) The types of Labour Inspection punishment proceedings

With regard to punishment procedures of the Labour Inspectorates in Europe we have to differentiate between criminal judicial procedures and administrative infringement procedures.

Diagram 8 Types of sanctions imposed or promoted by Labour Inspectorates

	BE	MT	HU	FR	AT	DE	IT	PT	ES
Criminal Sanctions	X (30%)	X		X			X		
Adminis. Sanctions	X (70%) They can be appealed to Labour Courts	X (in a few cases)	X They can be appealed to Labour Courts	X (in a few cases)	X They can be appealed to Courts for Adm.	X They can be appealed to Penal Courts	X They can be appealed to Courts for Adm. Affairs	X They can be appealed to Labour Courts	X They can be appealed to Courts for Adm.

As we can see in the above figure there are Labour Inspectorates where the criminal judicial procedures are the most relevant (France, Malta, and Italy), others which have exclusively administrative punishment procedures (Portugal, Austria, Germany, Hungary and Spain) and another with both types (Belgium).

b) The legal role of Labour Inspectors with regard to punishment proceedings

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. Described in the figure below.

Figure 9 Role of Labour Inspectors in the prosecution of offences

	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

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, and analysis and exchange of relevant information”, “the training of staff” and “common investigative techniques” would not be applicable to several European Labour Inspectorates.

c) The amount of the fines

Other aspect is the variation of the amount of the fines for OSH-related infringements. They can vary considerably from 55 € to 819.780 € depending on the legislation from each MS and the seriousness of the infringements.

Figure 10 Amount of the fines imposed or proposed by Labour Inspectorates

	BE	MT	HU	FR	AT	DE	IT	PT	ES
Criminal Sanction	from 275 to 33.000€ (level 4 th sets up imprisonment sanction)	imprisonment (max two years) or fine (from 466€ to 11,647) or to both					“contravention” punished with “arrest” or a “fine”.		
Adminis. Sanction	from 55 to 16.500 €	200 and 450 €	from 8.000 € to 80.000	750 € (cases of non previous declaration, or non declaration of a posted worker’s accident)	from 145 € to 14.530 €.	on the spot: 5-35€. The maximum fine is 500,000	from 50 to 40.000€.	from 204€ to 122.400 €	from 40 to 819.780 €

d) The liability regime

It also varies the behaviours that constitute infringement and the liability of the main contractors for the infringements committed.

Figure 11 Forms of liability on OSH legislation

	BE	MT	HU	FR	AT	DE	IT	PT	ES
Employer liability	App	App	App	App	App	App	App	App	App
Subsidiary liability of main contractor			X (when the subcontractor doesn't pay the fine)				X		
Direct responsibility of the main contractor						X	X		X (in certain cases)
Joint liability of the main contractor								X	X

e) Mutual assistance in punishment procedures

The support of the authorities from Member States in punishment procedures (notification, attend judicial processes at witnesses, etc.) is a matter of mutual assistance that a Directive should regulate.

4.2. THE FRAMEWORK DECISION 2005/214/JHA

The Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties⁴⁸ is the result of a process initiated in the European Council meeting in Tampere in 1999.

This Framework Decision is not based on “mutual assistance” principles but in “mutual recognition” because it deals with the execution of decisions issued in other State and not a mere collaboration with other authorities and the monies shall accrue to the executing State .

Occupational Safety and Health (OSH) and other matters relating to Posting Workers Directive 96/71/EC are not expressly mentioned in the scope of this Decision pursuant to article 5 (1) but its last paragraph states that “offences established by the issuing State and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty”.

Pursuant to the paragraph 3 of this article, offences other than those covered by paragraph 1 are subjected to the condition of double criminality in both Member States.

⁴⁸ OJEU L 76/16 22.3.2005

Some participants of the Cibeles Project consider very doubtful that the FWD 2005/214 could be applicable to the infringements in matters relating to Article 3 of the Posting Workers Directive 96/71 which include OSH infringements according to the context of the FWD 2005/214 (the former third pillar or the current Title V of the TFEU –area of freedom, safety and justice-). It has to be verified if only criminal offences are in focus⁴⁹.

Execution of fines promoted by Labour Inspectorates (especially on OSH) can be clearly carried out by FWD 2005/214 rules when the fines are imposed by judicial authorities and when they are imposed by administrative authorities and can be appealed before criminal courts as in France, Malta, Germany, Belgium (in 30% of cases) and Italy (when these two MS implement the FWD).

It is more doubtful, and this may depend on the nature of the national legislation, when the fines are imposed by administrative authorities and can be appealed before other courts than the criminal court (in particular for administrative or labour affairs) as it occurs in Portugal, Austria, Belgium, Hungary, Spain, and Italy.

As in the above mentioned Convention on Mutual Assistance in Criminal Matters this is a matter of interpretation of the term "in particular" in paragraph (iii) of article 1 (a): "an authority of the issuing State other than a court in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters"

Portugal⁵⁰ and Austria⁵¹ consider that the court to appeal can have jurisdiction in criminal matters in a broad and material sense (for criminal or administrative sanctions) whereas Belgium⁵², Hungary⁵³ and Spain consider that the Framework Decision is only applicable for administrative sanctions which can be appealed to criminal courts, In the case of Spain this interpretation is literally stated in the Law of transposition 1/2008⁵⁴.

In any case this aspect concerns not only the countries that deliver administrative fines but also the countries that should enforce them. This is to say that all countries are eventually concerned. E.g. France considers that the Decision is only applicable to administrative fines that can be appealed in criminal courts⁵⁵.

A questionnaire of the Council about the enforcement of this rule reflects clear discrepancies among Member States about the application of the FWD to administrative sanctions⁵⁶.

4.3. THE DIRECTIVE 2010/24/EC

The Directive 2010/24/EC of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures⁵⁷, provides in Article 2.2 for the execution of "administrative penalties" imposed by the administrative authorities that are

⁴⁹ Report on Portugal (Section 5)

⁵⁰ Report on Austria (Section 5)

⁵¹ Report on Belgium (Section 5)

⁵² Report on Hungary (Section 5)

⁵³ Report on Spain (Section 5) and Chapter 3, Section 4. Prof Alfonso Ybarra Bores

⁵⁴ Report on France (Section 5)

⁵⁵ Implementation of the Framework Decision of the Council of the European Union of 24 February 2005 (2005/214/JHA) of the application of the principle of mutual recognition to financial penalties - Information provided to the General Secretariat. 16924/1/10, 8 December 2010

⁵⁶ OJEU L 84/1 31.3.2010

competent to levy the taxes or duties concerned or carry out administrative enquiries with regard to them, or confirmed by administrative or judicial bodies at the request of those administrative authority.

This would be a mechanism of mutual assistance for the execution of fines but not of mutual recognition.

These penalties can be based on public duties of any kind levied by or on behalf of a Member State or its territorial or administrative subdivisions, including the local authorities, or on behalf of the Union (Article 2.1). Administrative penalties of some Member States participating in the Cibeles Project may fall within the framework of this Directive.

However, the scope of this Directive may be dubious since the term “duty” can 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.

4.4. REFLECTIONS AND CONCLUSIONS

a) FURTHER ANALYSIS

As a first conclusion, it is necessary to analyse in the near future the real application of the FWD 2005/214 and Directive 2010/24 in order to obtain definitive conclusions on this matter.

- The FWD 2005/214 is still in a process of transposition and the European Commission programme has posed its revision in 2011. The future revision of this legal instrument would demand to include all the fines of any kind and its transposition to all Member States.
- It could be a Directive pursuant to Article 74 TFEU in the area of Freedom, Security and Justice for “administrative cooperation” in the execution of fines solely for procedural aspects leaving other material aspects such as infringements and penalties for other rules, including the usual safeguard clauses and accompanied by soft law measures such as code of practice and training for inspectors.

However, it is not clear that the context of the FWD (Title V) or Article 87 TFEU on Cooperation is the most appropriate. Unlike road traffic fines the Labour Inspectors are not always prosecutors of criminal offences. A regulation based on this title could not be applicable to all the Labour Inspectorates.

- On the other hand the Directive 2010/24 will come into force on January 1st 2012 and the Member States have not enforced it yet and therefore we cannot know the content of the rules.

In any case, the administrative penalties provided for in the Directive appear as an instrument to ensure the fulfilment of the legal duties on public incomes, rather than a duty itself. This kind of regulation cannot include the administrative penalties on occupational safety and health.

b) A NEW REGULATION ON EXECUTION OF FINES IN LABOUR INSPECTION MATTERS

Provided that the FWD 2005/214 and Directive 2010/24 are not consolidated legal instruments to execute fines promoted or imposed by other Labour Inspectorates or they can be fully applied only in a few Member States, a better option would be to regulate mutual assistance or mutual recognition for the enforcement of all the types of fines promoted or imposed by the European Labour Authorities in a specific legal instrument

This legal instrument should involve all the fines, criminal or administrative, regardless of what kind of tribunals or courts are competent for an appeal against administrative fines.

However, this kind of global regulation for all the financial fines (criminal and administrative) is very difficult to fit in the European Treaties and for that reason another more feasible solution could be to approve a new instrument for the cross-border enforcement of administrative fines that can be appealed before courts other than criminal courts in the domain of posting (the scope of Article 3 of the Directive 96/71/EU which includes OSH) pursuant to Article 114 TFEU or at least only in the domain of occupational safety and health pursuant to Article 153 TFEU.

This could be based on the following grounds:

- The FWD 2005/214 is still in a process of transposition and the European Commission programme has posed its revision in 2011. The future revision of this legal instrument would demand to include all the fines of any kind and its transposition to all Member States.
- It could be a Directive pursuant to Article 74 TFEU in the area of Freedom, Security and Justice for “administrative cooperation” in the execution of fines solely for procedural aspects leaving other material aspects such as infringements and penalties for other rules, including the usual safeguard clauses and accompanied by soft law measures such as code of practice and training for inspectors.
- **It could be a Directive pursuant to Article 74 TFEU in the area of Freedom, Security and Justice for “administrative cooperation” in the execution of fines solely for procedural aspects leaving other material aspects such as infringements and penalties for other rules, including the usual safeguard clauses and accompanied by soft law measures such as code of practice and training for inspectors.**
- **Finally, it could be a Directive, Decision or Regulation on Mutual Assistance pursuant to Article 197 TFEU facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support.**

c) HARMONIZATION OF INFRINGEMENTS

It remains eventually to determine which infringements concerning safety and health (as this is possibly a very extended issue) could be called upon and regulating this matters following the example and the guidelines of the Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

Double criminality used to be a precondition for mutual assistance and mutual recognition for the cross-border enforcement of fines and for that reason harmonization is also a precondition to implement such a measure.

3 Project CIBELES conclusions and proposals

3.1 CONCLUSIONS AND PROPOSALS

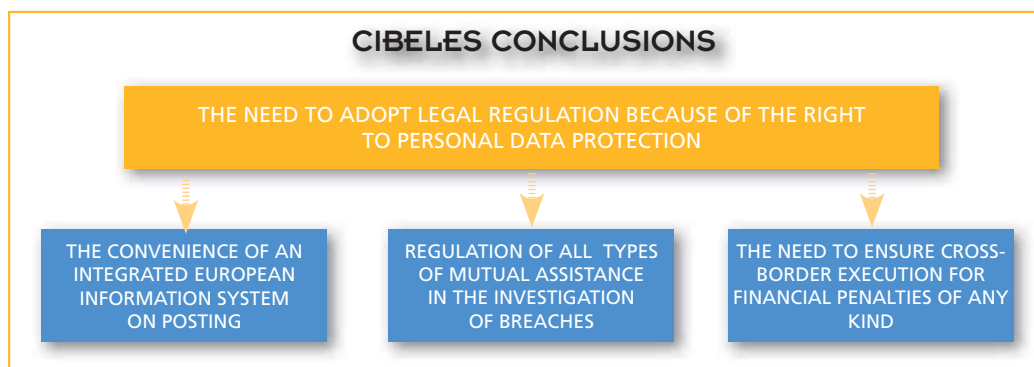
The purpose of the Project is to improve the way in which information is exchanged between European Labour Inspectorates to ensure enhanced cross border enforcement and mutual assistance in inspection and sanctioning proceedings and making proposals to the SLIC and the Commission with a view to further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

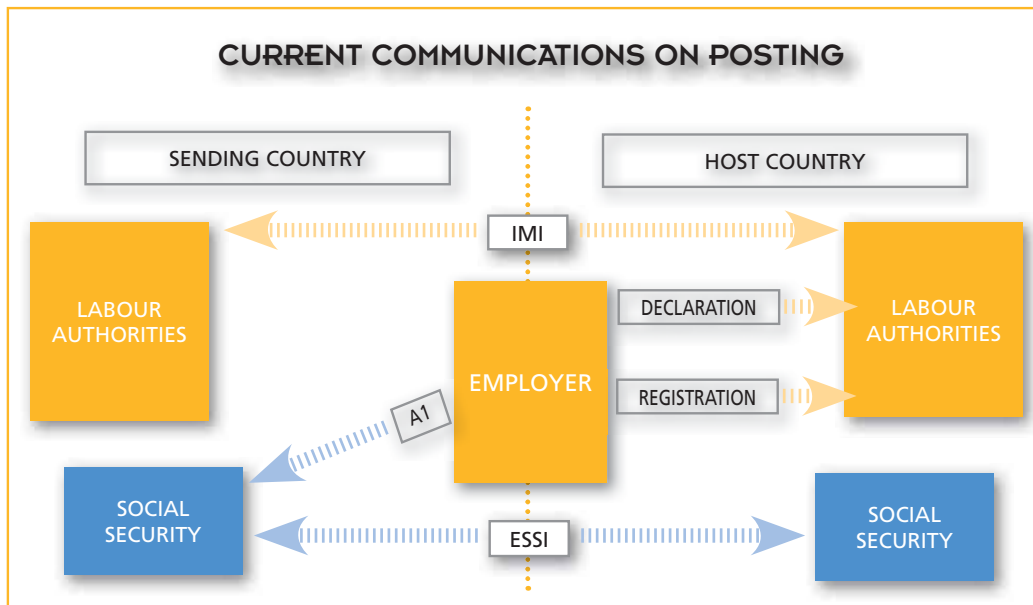
This future network will function exclusively between social security institutions exchanging information upon request.

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.

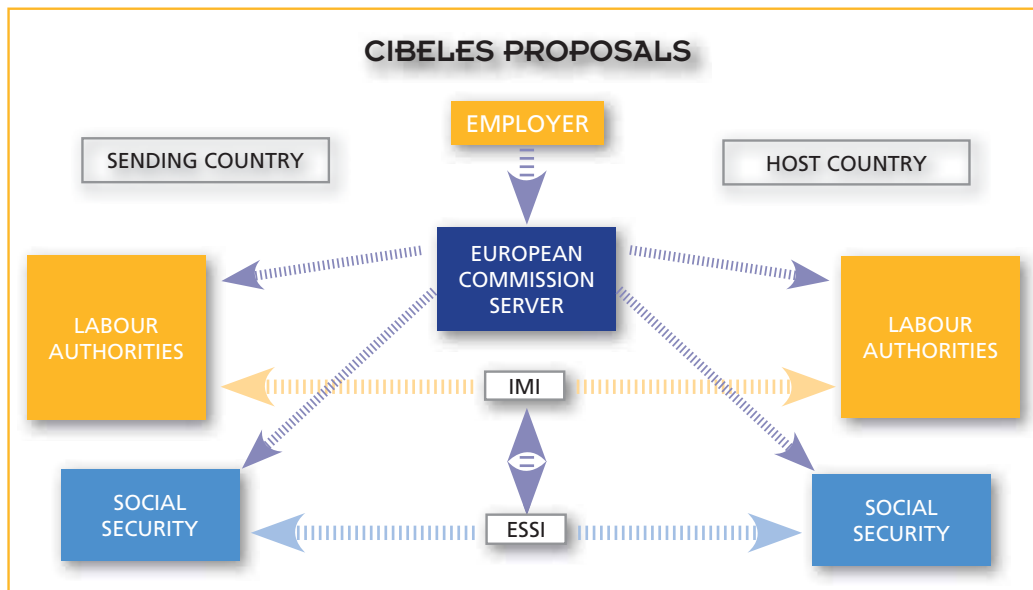
This facility should be advertised in all public electronic means, forms and offices to ensure legal certainty and compliance with data protection regulations.

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 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 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

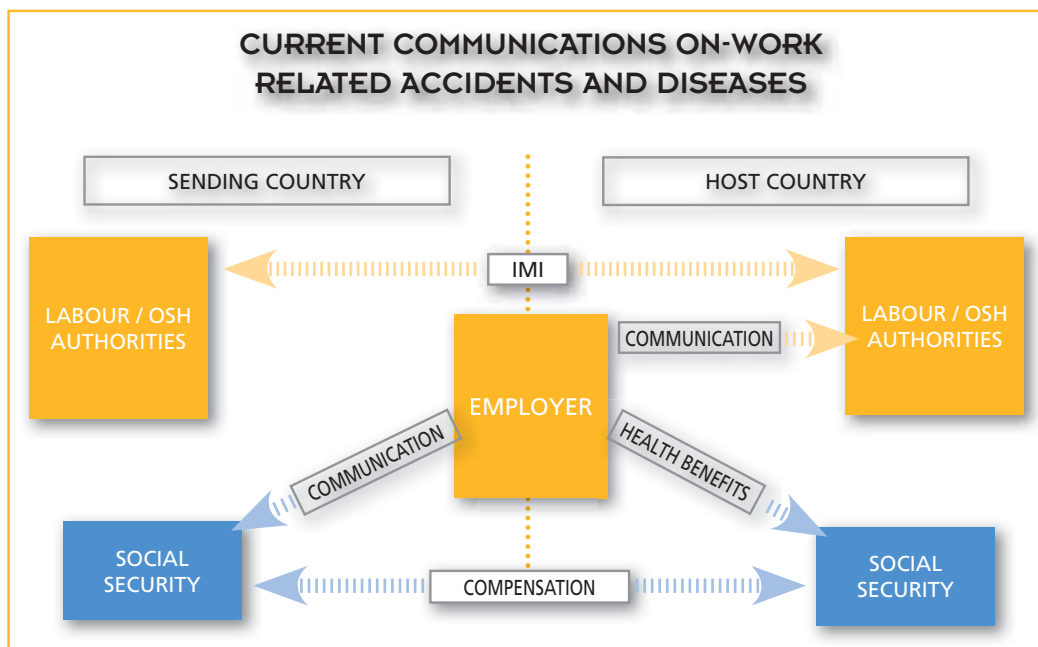
The on-line confirmation receipt delivered by the system serves as evidence of compliance.

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

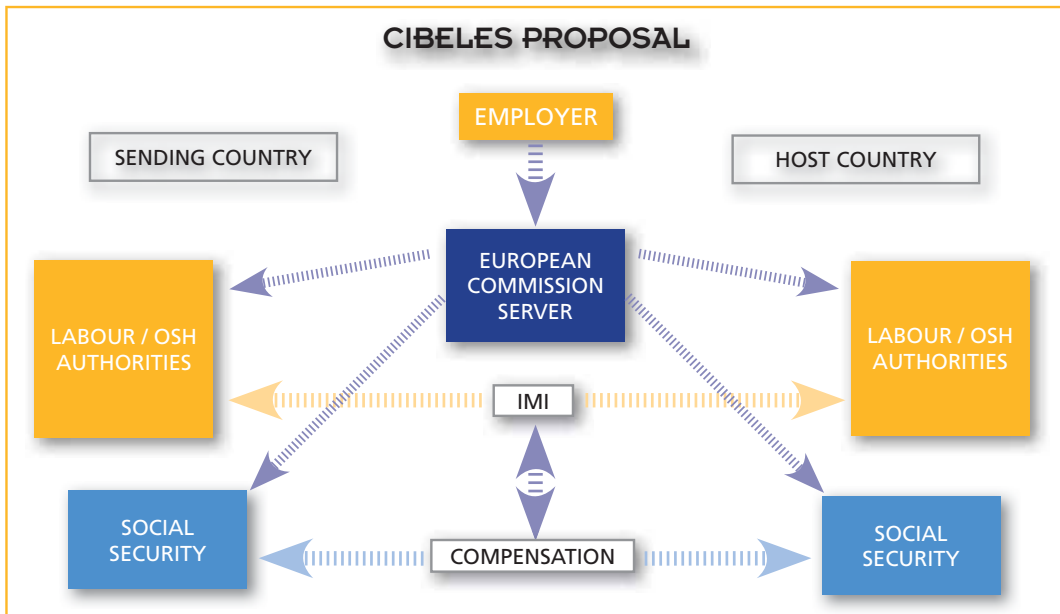
According to article 34 of the Regulation 987/09, in case of posting the declaration or notification of work-related accident or illness shall be addressed to the competent institution of the country of origin. Paragraph 2 states that “the institution of the Member State in the territory of which the 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 EUROSH

A network of experts in the Inspectorates on Occupational Safety and Health (EUROSH) 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 Report on Belgium (Section 3)

⁷ 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 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 CIBELLES 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 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 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 Prof. Justin Byrne.

¹⁴ Report on Malta (Section 2).

¹⁵ See also below paragraph 3.1 of this Chapter.

¹⁶ Report on Austria (Section 2); Report on Germany (Sections 2 and 4) : Report on Portugal (Section 1)

¹⁷ 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 Belén Plaza Cruz.

²⁰ Fabienne Muller.

²¹ 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 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.

CIBELES

P r o j e c t

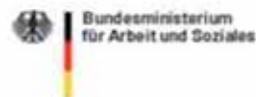


*Ministero del Lavoro
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Direzione generale per l'Attività
Ispettiva



Occupational Health & Safety Authority



Inspección de Trabajo
y Seguridad Social



MINISTERIO
DE TRABAJO
E INMIGRACIÓN

SUBSECRETARÍA

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