MEMORANDUM FROM FRENCH SOCIAL SECURITY INSTITUTIONS ON **MOBILITY WITHIN THE EU**

PROTECTION SOCIALE FRANÇAISE

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FOREWORD

Worker mobility is a **fundamental right that is deeply intertwined with the European project.**

Starting with the Treaty of Rome in 1957, the Member States have adopted shared rules to protect mobile workers' social security rights. These rules have undergone modernisation to fit new mobility situations.
The goal is not to harmonize social security systems but rather to coordinate them.

The principle is a simple one that protects citizens' rights.

Under the European social security coordination regulations, all citizen's periods of employment and insurance in another member State can be considered and their social security entitlements can be exported in the event of mobility within the European Union.

This means that mobile workers, who can be salaried or self-employed, do not lose the entitlements they have accrued in the member States where they have worked.

Today, **17 million Europeans are residing or working in another member State and 4% of the EU's working-age population is living in another EU country**. This phenomenon of mobility is expanding and is not expected to lessen.

In order to ensure free movement for citizens, the principle of loyal and sincere cooperation and of legitimate confidence between national social security institutions has been enshrined in the European identity.

This principle shall be respected by the member States. As things currently stand, mobility practices can be unfair due to a lack of oversight and boundaries.
The lack of solution to guarantee trust between Member States and citizen is a threat to the achievement of the European project itself. Indeed, some mobility situations are complex and can have a great impact on mobile workers' lives.
Mobile workers can quickly get lost in red tape if their required paperwork is not clear and simple, with consistent rules that apply to their circumstances. The obstacles to cooperation between social security institutions at all levels (local, national, and European), can undermine citizens' ability to exercise their rights.
However, we are not starting from scratch. Cooperation within the EU is improving and producing positive effects that continuously facilitate the management and control of mobility situations.

France, Belgium, Italy, Portugal, Poland and Spain have recently been developing bilateral cooperation to fight against cross-border social security fraud. Through these programs, not only have potential cases of fraud been identified, but those engaging in such practices have been found guilty in courts of law.

The original ambition of helping an individual to keep their social security coverage, even when they cross borders for work, must not become a way to get around the host country's social security laws. The current system risks favoring those countries' security systems that provide the least extensive coverage to their citizens.

On a broader level, mobility situations are getting even more complicated through resorting to less-known legal structures, such as pursuit of activity in two or more Member States, road cabotage or civil air transport. Indeed, these special legal regimes can be used by employers or workers (whether salaried, self-employed, or both at once) to **unduly avoid paying social security contributions in the country where the work is actually being performed**.

Conversely, mobile workers genuinely engaging in multi-State employment want the process to be simplified and safeguarded.

The failure of the negotiations to revise the European coordination regulations during the European Parliament's previous term (2014-2019) must not undercut the priorities championed by France nor invalidate the considerable workable progress that was achieved during this long negotiating process.
The Representation of the French Social Security Institutions to the EU (REIF) wishes to address once again this issue.
It is vital that we engage with our European partners and work towards compromises that will allow us to move beyond the current divisions on this sensitive issue.

Waiting 10 to 15 years for the European coordination regulations to be revised could be detrimental to the principle of equal treatment and pose a serious threat to European citizens' rights to mobility. This could also further prolong the European Union's being symbolically equated with a bureaucratic structure that was set up solely for financial purposes and to facilitate social dumping.

The European Parliament's 2019-2024 term is crucial to revise the regulations that are so important for European citizens.

REIF would like to contribute in full to the European discussions in this area. Below is a review of the main issues, along with concrete solutions and recommendations for Europe's future decisionmakers.

I. EU LAW ON MOBILITY: AN EVOLVING LEGAL FRAMEWORK WITH ROOM FOR IMPROVEMENT

1. POSTINGS

Postings are too often incorrectly interpreted by the media and portrayed in an oversimplified manner. Indeed, labour law and social security regulations as they apply to postings are quite often confused. Indeed, the same mobile worker is subject to two sets of laws at the same time: labour law and social security law. Now, while progress was made at France's behest on the labour-related issues during the European Parliament's previous term, the work on social security issues fell through right before the 2019 European parliamentary elections, despite lengthy deliberations.

a) Postings from a labor law perspective

With regard to labour law issues, postings come under EU directive 1996/91/CE, as revised by directive 2018/957 (the latter will come into force from July 2020), and the application directive 2014/67/CE. Regulation 883/2004 sets forth the provisions regarding social security law.
As pertains to labour law, the new directive allows for the labour law of the host country to be combined with that of the home country to determine working conditions. The prevailing rule is that a core set of provisions, i.e. the host country's essential labour law rules, must be followed both by the mobile worker and by their employer. This includes remuneration. The law which the parties have chosen as applicable to the contract – most often the home country's law – applies to the remainder of the employment contract falling outside the "core set" of provisions. Labour law does not place any time restrictions on postings. However, starting from the entry into force of the directive 2018/957, the provisions of the French labour code will apply to mobility periods longer than 12 months or up to 6 years in the event of a derogation with the exception of rules governing the conclusion and the termination of the work contract.

The core set of provisions has been expanded three times. First, the revised directive enshrines the principle of equal treatment between local and posted employees in these "core" areas. Then, the broader concept of remuneration has replaced that of wages, making it possible to clarify and safeguard what must be paid to the posted worker, most importantly by incorporating European legal precedent: it is not enough to pay the minimum wage of the country of employment Merely respecting the minimum salary of the country of employment does not suffice. The remuneration of posted workers should also conform to labour law and extended sector-based agreements, including matters regarding bonuses and compensations.
This refers to the principle of "equal work for equal pay." Finally, work-related transportation, housing, and meal expenses incurred by the employee while posted to France have been added to the list of "core" items. If they are covered by law or the applicable collective agreement, these expenses must be reimbursed and cannot be deducted from remuneration. The refund of other fees such as travel expenses to the country of employment is ruled by the law of the sending country.
With regard to paperwork, a compulsory pre-posting declaration must previously have been submitted to the Regional Directorate for Enterprises, Competition Policy, Consumer Affairs, Labour, and Employment (DIRECCTE) for all workers being posted to France. Comparable processes are in place in almost all European Union member States.

b) Postings from a social security law perspective

The posting mechanism, under European regulations No. 883/2004 and 987/2009, allows a salaried or self-employed worker who temporarily goes to another country to work to remain

* http://direccte.gouv.fr/

a member of the social protection scheme of their usual country of employment, provided that certain requirements are met.
A posted salaried worker must not be sent over to replace another posted worker, and the foreseeable length of posting must not exceed 24 months.
A posted self-employed worker must habitually perform substantial business activities in their usual country of employment and must be going to another State in order to perform similar activities. In this case as well, the foreseeable length of posting must not exceed 24 months.
A significant discrepancy with the directive ruling labour law is becoming apparent. Regarding social security law, the regulation 883/2004 states that the law of the sending country always and solely prevails on the rates and amounts of social contributions paid by the employer and the salaried or self-employed workers.
Incoming and outgoing posted workers are entitled to a portable document, known as an A1 form, that certifies which social security legislation is applicable to them. **Only one single social security legislation is applicable to any given worker**. Double or triple membership is not possible.
However, companies are not required to produce an A1 form for their mobile employees, nor are self-employed workers required to produce one for themselves as a compulsory prerequisite for posting. This can be problematic in the event of a dispute with the host country's social security institutions.
France's legislation now includes an obligation to produce an A1 form to the competent authorities at their request, and applies a penalty in the event of non-compliance with this obligation.

2. MULTI-STATE EMPLOYMENT

Apart from posting, other legal procedures that are much less exposed can lead to exonerate employers and workers from paying social contributions in the country of employment.
Their use has become much more widespread, in particular because the rules are less restrictive.
This is true for the multi-State employment regime. The rules for multi-State workers, who come under Article 13 of regulation 883/2004, **are much more flexible than the posting regime. Multi-State workers are workers engaging in one or more salaried-or self-employment activities, either simultaneously or on an alternating basis, in two or more EU or EEA member States or Switzerland, on behalf of one or more employers.** There is a wide variety of possible cases of multi-State employment. For example, the same worker can be engaging in salaried employment on behalf of one or more employers in several States while engaging in self-employment in other States.
The basic rule is that a multi-State worker can remain a member of the social security system of their country of residence, provided that they engage in a "substantial part of their activity" in that country, a criterion that can be difficult to assess. The lack of conceptual clarity as to what constitutes substantial activity affords considerable leeway to individuals declaring multi-State employment, as they can easily take advantage of this to remain members of their home State's scheme and to avoid paying contributions on their employment activities in the other State, insofar as practical oversight over income generated in another member State is difficult to perform.

3. AIR CREW MEMBERS: A SPECIAL CASE

Requiring membership in the State where the worker's "home base" is located has made it easier to combat social dumping. However, some "low cost" airlines have chosen to change their pilots' home base on a regular basis in order to take advantage of multi-State employment rules.

4. WHY ADJUST THE MOBILITY RULES IN EU LAW?

A few simple observations demonstrate the need for prompt adjustments to the European regulatory framework, despite the significant progress that has been made, particularly that based on directive EU 2018/957, as previously mentioned.

a) Postings, sine qua non of mobility within Europe

The rules for posting a worker within the EU allow a contractor, a corporation, or a temporary employment agency operating in one member State to employ workers in another member State while bypassing portions of the labour law that applies in the country of employment as well as that country's social insurance schemes.
Currently, a company can be approved for new postings **without any checks as to whether they actually paid the social charges due for previous postings.** Committing fraud is easy, especially since there is almost no communication between the collecting organisations of the different Member States.
This shows that factual circumstances need to be able to be taken into account as a way to eliminate non-payment of social charges in the State of employment, when these circumstances do not qualify for a posting. This is not currently possible as the simple possession of a certificate of applicable legislation, regardless of factual circumstances, **precludes billing for social charges (and requiring employee membership) in the country of employment.**
Now, the number of workers posted within Europe has risen considerably over the past fifteen years. Indeed, 1.7 million of the total 2.8 million A1 forms issued in 2017 were for posted workers. **The use of postings has become commonplace in certain sectors.** This calls into question the subsidiary nature of postings, which originally constituted an exception to the rule of international law that stipulates that an employment contract must comply with the host country's social security and labour laws. It is also significant that the proportion of postings lasting a year or more is steadily increasing.

b) The recent boom in multi-State employment

The latest figures from the European Commission's report on A1 forms issued in 2017 also show massive and rapid growth in multi-State employment within the EU, both incoming and outgoing. These figures most likely underestimate actual practices. The number of A1 forms issued to individuals under article 13 has risen from 168,279 in 2010 to more than a million in 2017.
The applicability requirements for article 13 are much easier to fulfill and therefore sought-after by companies looking to choose the most advantageous social security legislation, e.g. by claiming that an employee is not on a posting but working in several member States.

In practice, the lines between postings and multi-State employment are becoming increasingly blurred with an increase in the use of multi-State employment rules in such areas as road transport and constructions.

c) European legal precedent has set up roadblocks that are hindering efforts to combat the circumvention of applicable laws

The CJEU often points out that there is no deadline under the coordination regulations for the issuance of an A1 form. Even if it is issued during the worker's period of mobility, **it has retroactive effects.** Moreover, the member States cannot demand to receive it as a prerequisite for posting. In addition, the A1 form is binding upon the institutions, authorities, and courts of the State of employment, insofar as it has not been withdrawn by the issuing authority, thereby preventing the host State authorities from unilaterally changing the holder's applicable legislation.

The Court has shored up its precedent in recent years. In its Altun ruling of February 6, 2018, the CJEU allows a domestic judge **to render the A1 form inapplicable in the event of fraud, subject to a set of stringent conditions, but with no indication as the practical consequences of inapplicability.** This leaves the host country authorities with no binding solution to apply to the A1 holder at issue. In practice, an A1 holder whose document is rendered inapplicable risks becoming a member of two social security legislations at the same time, as the A1 form would not necessarily be considered as null and void by the home country authorities. However, this contradicts the basic principle of a single country of membership under social security law.
While this ruling appears to set forth an exception to the principle of binding enforceability of the A1 document as long as it has not been withdrawn by the issuing authority, it is difficult to apply in practice. This is problematic for the Social Security institutions, the employer, and the mobile worker alike.

5. REIF'S PROPOSED ADJUSTMENTS TO EU LAW

France's social security institutions believe that the only way to return to the original intent of the coordination regulations, i.e. safeguarding social protection entitlements under domestic legislations and restoring confidence in Europe, is to **adjust EU-wide mobility rules.**

As stated before, the recent failure of negotiations on the revision texts of the European coordination regulations should not question the priorities advocated by France during this long process of negotiations.

These priorities include :

- Prolonging and expanding the exportability of unemployment benefit entitlements ;
- Instituting a pre-posting notification system;
- Stepping up requirements for postings and for multi-State employment by ensuring that the posted or multi-State worker is firmly anchored to their State of membership;
- Setting reasonable response times between EU states' social security administrations in order to expedite verifications and make them more efficient;
- Reinforcing and improving the communication and conciliation proceedings that take place when an A1 withdrawal request is submitted.

In light of the above, REIF believes that it is essential :

- **That a request to add Guillaume Balas' report to the agenda of the future European parliament's Conference of political group presidents be submitted and approved so that MEPs can resume work on these issues and reach a compromise with the EU Council during the upcoming term;**
- **To follow this initiative up with a show of support for the future European Commission's continuation of this project so that it is included in its future work agenda for 2019-2024.**

II. BOLSTERING COOPERATION BETWEEN SOCIAL SECURITY ADMINISTRATIONS WITHIN THE EU IN ORDER TO TAKE EFFECTIVE ACTION AGAINST CROSS-BORDER SOCIAL SECURITY FRAUD

Social security fraud is punishable under EU member States' existing domestic law. However, the coordination regulations neither require institutions to perform verifications nor impose quality standards for information shared. Moreover, A1 forms can be issued retroactively. All this means that changes to the law will be totally ineffective if no system is set up for the exchange of information between national authorities within the EU.
A disconnect between the posted or multi-State worker's country of employment and the country in which social security contributions are paid on that employment raises issues which are specific to each situation and nullifies each of these countries' domestic verification and inspection procedures.
To better tackle the growing popularity of posting and pursuing activity in two or more countries and the sophistication of rules bypassing, we must intensify the cooperation between Member States to bring out satisfying levers to respond to the challenges we face.
It is currently too easy for fraudsters to take advantage of the same administrative roadblocks that persist between public institutions which have been eliminated for citizens and for goods.
We must implement these partnerships both on the bilateral and European levels.

1. FRENCH-PROPELLED BILATERAL COOPERATION PROGRAMS

In real terms, bilateral cooperation within the EU is moving forward rapidly, bringing about positive effects that are improving the day-to-day management, oversight, and verification of mobility situations.
Without waiting for new rules to be adopted, France's social security institutions have partnered with their European counterparts in Belgium, Italy, Poland, Portugal, and Spain over the past two years to set up and roll out bilateral cooperation programs to combat cross-border social security fraud in a more effective manner.
These cooperation programs are based on the exchange of information, access to data (e.g. posting and multi-State employment data archive or registry), and joint examination of actual cases of suspected fraud.
The fact that we lack an assessment and a statistical review on the results of these partnerships can be explained by the early stage of development of bilateral cooperation. However, the initial results are highly encouraging as they have allowed for the rapid detection of non-compliance with posting and multi-State employment rules in actual real-life cases, resulting when possible in concerted investigative action.
These cooperation programs are particularly advanced with Belgium, as the French Social Security Central Agency (ACOSS)' Information Systems will soon be able to interconnect with the Belgian national social security office (ONSS) to optimize anti-fraud efforts. Indeed, the successful resolution of critical mobility situations largely depends on shared understanding and on converging interpretations of the coordination rules among all EU member States.
This means that the end goal is to be able to oversee and verify mobility situations on the basis of loyal and sincere cooperation.

2. EU-PROPELLED COOPERATION PROGRAMS

- EESSI, a catalyst for cooperation that greatly expedites the detection of cross-border mobility situations

The rollout, albeit a gradual one, of the Electronic Exchange of Social Security Information (EESSI) throughout all EU member States beginning in July 2019 is expected to make it easier for social security institutions within the EU to share information, as the issuing authorities will send social security forms (SED), including those relating to applicable legislation, in electronic format.

Assuming that the Member States' institutions are fully on board, the electronic exchange of information should be beneficial not only to the social security institutions but also to mobile workers, who will no longer be required to personally submit proof of a pre-posting or pre-multi-State employment declaration. Indeed, this declaration will have been submitted electronically to the authorities in the host country.

The benefits will be numerous: better communication and greater interaction between social security administrations within the EU, elimination of energy-consuming paper-based communications for social security administration staff, implementation of more targeted statistical instruments allowing for a more precise assessment of the phenomenon of mobility within the EU, etc.

While waiting for the effective start of information exchange through EESSI, we should give priority to dematerialized exchanges of the files of A1 forms generated by the competent institutions.

- The future European Labor Authority has great potential to facilitate cooperation:

The French social security institutions wish to explore the potential of the future operational tools implemented by the ELA that will reach its full capacity in 2024. **In order to achieve its goals, ELA will need substantial funding as well as the opportunity to draw on European domestic social security institutions' considerable expertise, which is often overlooked at the European level due to a greater focus on labour-related issues.**

The Authority needs the means to set up a more automatic exchange of information between domestic institutions in charge of combating illegal or undeclared unemployment, particularly those in charge of oversight, inspections, and collection of social security contributions and benefits within the EU.

Cooperation is essential as the issues raised by cross-border social security fraud call on several areas of expertise and sources of information :

- Determining which social security legislation applies to a salaried or self-employed worker;
- Calculating contributions, social charges, and cross-border collections;
- Demonstrating the substantial nature of the employer's business activities in the sending country when engaging in an international provision of services (posting, etc.),
- Information on a company's tax and VAT data or other provisions that would make it possible to verify the actual existence of business activities in one or more member States.

In light of the above, the French social security institutions would like to see the European Labour Authority roll out :

• **Digital solutions to gather information on actual payment and receipt of social security contributions** from participating member States' oversight authorities. The medium- and long-term goal is to build a **permanent Union-wide exchange and cooperation system** ;

• **A document database that can be used to check each State's current domestic laws as they pertain to social charge policy** ;

• **Joint or concerted inspections** for which France's social security inspection authorities to receive funding covering translation, interpretation and legal assistance fees. France and Belgium could pave the way here given their high level of cooperation.

• **Follow-up on any difficulties encountered, including during the collection of contributions due in the country of employment**.

CONCLUSION

In the end, REIF hopes to convey the following messages :

1. The sound administration of mobility rules on workers (salaried or self-employed) in the EU is a ground element of the faith our citizens hold in a "protective Europe" that supports and does not threaten national social protection systems.
2. While the labour law playbook regarding mobile workers has evolved, social security-related rules remain on hold to be dealt with as a priority matter by the new EU Parliament.
3. While France's representatives must continue to champion the key points of their approach, they must do so while seeking out allies and compromises so as to keep from getting bogged down in endless positioning and negotiations with no prospects for success. It is essential to get to a place of mutual understanding. This issue cannot be dealt with by focusing only on financing and social dumping: individuals' social entitlements as well as safeguarding and simplifying the established paperwork for businesses and for mobile workers must also come into play.
4. For postings, disconnects between the country of employment and the country receiving social security contributions and overseeing compliance with social security laws are raising major issues in terms of fraud and oversight which have not been resolved to date, in spite of preliminary attempts at bilateral cooperation which must be encouraged, assessed, and publicized.
5. A better organisation of the administration of workers mobility in Europe also means a more efficient management of incoming and outgoing posting for the French social protection.

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The Representation of the French Social Security institutions to the EU (REIF) was created in May 2003 to represent the French social security agencies to the EU institutions.
Since April 2015, REIF gathers all the Branches of the general scheme (salaried and independent workers) together with the scheme for farmers: the health insurance (CNAM), the old-age insurance (CNAV), the Family fund (CNAF), the social security collection body (ACOSS), the farmer scheme (CCMSA), the self-employed as well as the French University for Social Security (EN3S) and the Union of the National social security funds (UCANSS). The European and International Social Security Liaison Centre (CLEISS) and the national Pension Fund for Professional Flight Attendants in Civil Aviation (CRPN) recently joined REIF.