EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Direct Taxation, Tax coordination, Economic Analysis and Evaluation
Direct Tax Policy & Cooperation

Brussels
TAXUD.D.2.002/AR

COMMISSION EXPERT GROUP "PLATFORM FOR TAX GOOD GOVERNANCE"

TAX IN AN INCREASINGLY MOBILE WORKING ENVIRONMENT: CHALLENGES AND OPPORTUNITIES

Meeting of Thursday, 7 October 2021

WORKING DOCUMENT

1. INTRODUCTION

Statistics show that nowadays many individuals cross borders within the EU to go to work every day or move to live in another country as a posted worker, mobile worker, seasonal worker, artist, lecturer etc., being either employed or self-employed.[1]

The COVID-19 pandemic forced governments to take unprecedented measures such as restricting travel and implementing strict quarantine requirements. As a result of these restrictions, many cross-border workers are or were unable to perform their duties in their country of employment. Home-offices and teleworking are now much more widespread than before. This is raising many tax issues in cross-border situations.

This paper discusses the impact of the pandemic on the tax situation of cross-border workers, in both the country of employment and the source country.

2. TAXATION OF CROSS-BORDER WORKERS AND TELEWORKING

2.1. The Principle: Taxation at the place of activity

Cross-border workers may be subject to taxation in both the state of source, as the place of activity is located within its boundaries, and in the state of residence, because they live there. Double taxation may arise if both Member States consider the cross-border worker resident in their territory and both Member States tax the income.

In order to avoid double taxation, Member States have concluded Double Taxation Conventions (DTC), which are based on the OECD Model Convention (OECD-MC). Although the principles of taxation of employment income of this OECD-MC have been adopted in all Member States, their DTCs may vary considerably in particular concerning cross border workers and frontier workers. Double Taxation is avoided by the state of residence, either by the exemption method, i.e. exempting the income which had been taxed in the state of source, or by the credit method, i.e. the income is taken into account for taxation in the state of residence, but the tax paid in the state of source is credited against the state of residence’s tax charge.

The OECD-MC uses common definitions and suggests allocations of taxing rights between the state of source and state of residence. With regard to employment income, Art 15 OECD-MC provides as principle that employment income is taxable in the place of activity, i.e. where the work is performed.

Furthermore, Art. 15(2) OECD-MC allocates a taxing right to the state of source, if the following conditions are fulfilled:

– The employee is present in the source state for more than 183 days, or

[1] *“The latest developments confirm that intra-EU mobility continued to grow, but at a slower pace than in the previous years. In 2019, there were 17.9 million EU-28 movers in the EU-28, out of which 13 million were of working age (20-64 years), according to Eurostat figures. The stock of EU movers of working-age grew by only 1.2% in 2019, which is considerably less than the 3.4% in 2018. This is largely due to strong decreases of stocks of movers in the UK.”* See European Commission, DG EMPL - Annual Report of Labour Mobility 2020, https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8369

– The remuneration is paid by, or on behalf, of an employer who is resident in the state of source, or

– The remuneration is borne by a permanent establishment, which the employer has in the other state.[2]

As a result, if the activity is performed in a home-office and through teleworking, the place of activity will be the state of residence - therefore the income of the citizen would have to be split between the source state and the residence state on a pro-rata basis.

2.2. Derogations to the principle in individual Double Taxation Conventions concluded bilaterally by Member States

Member States have concluded bilaterally exceptions to the above-mentioned principle. Some Member States agreed on **de-minimis-limits**, according to which a certain number of days of absence from the usual place of activity in the other Member State does not lead to a split-up. Other Member States agreed on **specific cross-border commuter provisions**, according to which the taxation of the cross-border worker stays with the state of residence.[3]

2.2.1. De-minimis-limits as a derogation to the principle of taxation in the state of activity

Some Member States have concluded in their Double Taxation Conventions de-minimis-limits according to which the taxing right only goes back to the state of residence, if the employee has exceeded the number of days without presence at the site of the company. Some examples are described below. The list of examples is not exhaustive.

DTC Germany – Luxembourg:

According to a memorandum of understanding of 26 May 2011, the income needs to be apportioned between Luxembourg and Germany in the case where the employee does not work every day at the normal place of activity. However, according to the memorandum of understanding, there is **a de-minimis-limit of max 19 days/year** – if this limit is not exceeded, the employee may work from places other than the usual place of activity, for example missions, trainings or teleworking.

DTC Belgium – Germany:

The provisions correspond to the OECD-MC. No de-minimis-threshold has been agreed. Therefore, any teleworking results in an apportionment of income between the state of source and state of residence on a pro-rata basis.

DTC France – Luxembourg:

According to a supplementary Convention of 10 October 2019, the income of a cross-border worker will be taxable in the place of activity (normally Luxembourg), if the

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2 In Art. 15(2) OECD-MC, these conditions are defined in the opposite, i.e. the state of residence may tax the income, if the employee is present in the state of source not more than 183 days, and the remuneration is paid by an employer who is not resident, and the remuneration is not borne by a permanent establishment which the employer has in the state of source.

3 For an – incomplete – overview please see the Council of Europe, ReportCG37(2019)10 final. 29 October2019, Fair distribution of taxes in transfrontier areas; https://rm.coe.int/fair-distribution-of-taxes-in-transfrontier-areas-potential-conflicts-/168097f09d

cross-border worker respects a de-minimis limit of **maximum 29 days/year** in which he or she may work in the state of residence (normally France) or in a third country.

DTC Belgium - Luxembourg

According to a memorandum of understanding of 16 March 2015, the income will be subject exclusively in the state of source if the employee respects the de-minimis-limit of **maximum 24 days/year** in which he or she may work in the state of residence (normally Belgium) or in a third country.

DTC France – Germany / DTC Belgium – France / DTC Germany – Austria

Unless the specific provisions for cross-border commuters apply, the respective Member States did not agree on a de-minimis-limit. Any teleworking in the state of residence will result in an apportionment of the income between the two contracting partners.

Result: the scope of teleworking without tax repercussions by an apportionment of income between the state of activity and the state of residence is small, if one of the rare exception apply. In the other cases the first day of teleworking would already lead to an apportionment of the income between the two Member States involved.

2.2.2. *Specific Cross-Border-Commuter Provisions*

A few Member States have concluded specific provisions to facilitate cross-border work in the border zone. If certain requirements are fulfilled, mostly the distance of the place of activity and place of residence within the border zone of the two Member States, then – in contrast to the OECD-MC - the state of residence will retain the taxing rights for the employment income of the citizen.

DTC Germany – France

The specific cross-border commuter provision provides for a de-minimis-rule of max. 45 days/year without being present at the usual place of activity. However, teleworking is considered as an activity which has been exercised in the border zone and therefore is not taken into account for the determination of the 45 days threshold. Employees in the German-French border zone therefore do not have any tax repercussions from teleworking.

DTC Germany - Austria

The specific cross-border commuter provision in the German-Austrian DTC provide for taxation in the state of residence if both the place of activity and place of residence are within the border zone and the employee returns every day to his family home. A 2019 memorandum of understanding provides for a de-minimis-limit of max. 45 days of absence/year; teleworking, however, was explicitly excluded and is therefore taken into account for the calculation of the 45-day-threshold.

2.3. Special agreements addressing teleworking during the Pandemic

Member States quickly reacted to the new situation caused by the COVID-19 pandemic. The measures taken by various Member States included lock-downs or closure of frontiers, which made it impossible for cross-border workers to carry out their work at the usual place of activity. Depending on the measures taken in the respective Member States, employees were obliged to telework or the health services recommended the use of home-offices and teleworking.

In parallel, Member States identified possible repercussions of the increased use of home offices and teleworking on the tax situation of cross-border workers. Due to the impossibility for workers to reach their normal place of activity, the taxing right for the employment income would have switched under the existing Double Taxation Conventions to the state of residence, as explained above.

Some Member States proceeded with bilateral memoranda of understanding introducing the notion that the days spent in a home office would be deemed, for purposes of the application of the respective Double Taxation Conventions, as working days spent at the usual place of activity in the other Member State. Such memoranda of understanding are limited to persons who telework due to obligations or recommendation from public health organisations. Persons telework in the absence of COVID-19 rules or recommendations do not benefit from the scheme.

Due to its high numbers of cross-border workers Luxembourg has agreed on memoranda of understanding with all its neighbouring countries.[4]

France announced on 19 March 2020 in a Press Release that it agreed with Belgium, Germany, Luxembourg and Switzerland within the framework of the respective Double Taxation Conventions that the days spent teleworking are deemed to have been spent at the normal place of activity and thus no immediate tax repercussions would result.

Memorandum of understanding France-Luxembourg: the first memorandum of July 2020 has been prolonged four times. The present memorandum of 15 June 2021 stipulates that the exceptional measure will be in force until 30 September 2021.

Memorandum of understanding France-Germany: the first memorandum between Germany and France was signed on 13 May 2020. The present memorandum of 15 June 2021, which represents the 4th prolongation, expires on 30 September 2021.

Memorandum of understanding France-Belgium: the first memorandum was signed on 15 May 2020 and was prolonged 5 times. The memorandum will expire on 30 September 2021.

Memorandum of understanding Belgium–Germany: the first memorandum was signed on 6 May 2020 and was prolonged 6 times. The memorandum will expire on 30 September 2021.

Memorandum of understanding Belgium-Luxembourg: the first memorandum was signed on 19 May 2020 and was prolonged 5 times. The memorandum will expire on 30 September 2021.

Result: the memoranda of understanding concluded by the various Member States mitigate the risk of tax repercussions due to home offices and teleworking during the Pandemic. The situation will be different once these memoranda of understanding no longer apply and if the applicable provisions of the respective DTC provide for an apportionment of the income between the involved Member States.

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[4] https://www.tf-grenzgaenger.eu/fileadmin/user_upload/Veroeffentlichungen/Teletravail_dans_la_Grande_region_avril2020.pdf

2.4. Possible Tax Repercussions for the Teleworking Citizen

In case a citizen is considered to be subject to income tax in both the Member State of activity and the Member State of residence due to teleworking, the citizen and employer may be subject to the tax repercussions listed below. This situation is expected to become much more widespread, as teleworking is expected to be used significantly more often after the Pandemic than before:[5]

Tax repercussions for the citizen:

- The fact of being subject to income taxation by both Member States increases the risk of disputes on the appropriate split-up of the income generated in each of the countries, ultimately culminating in effective double taxation.
- Such effective double taxation may be relieved on the basis of the Dispute Resolution Directive, but this involves a lengthy and costly procedure.
- The citizen will be subject to additional compliance obligations as he or she would need to declare the employment income in two Member States. Also, the citizen will have to allocate his expenses to the income generated in each of the two Member States.
- The fact that the citizen will be subject to taxation in both Member States may have as consequence that he or she is not any longer eligible to certain deductions and tax benefits. For example, if the citizen, as a consequence of the apportionment, no longer earns more than 90 %[6] of his worldwide income in the state of activity, he or she then would not any longer be eligible to the Schumacker benefits.
- The situation will be even more complicated, if the state of residence does not apply the exemption method, but the credit method for the avoidance of double taxation. In this case, the income tax of the state of activity will be imputable on the tax charged by the state of residence, which will result in additional compliance issues.

Tax repercussions for the employer:

If the income is subject to a pro-rata taxation split between the state of activity and state of residence, this will also represent additional compliance cost for the company. The employer would have to adjust the taxable income by deducting the share of the income, which is attributable to the state of residence. Also, depending on the country, the employer would need to comply with the withholding tax obligations (if any) in the state of residence.

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[5] https://ec.europa.eu/jrc/sites/default/files/jrc120945_policy_brief_-_covid_and_telework_final.pdf

[6] Germany applies a 90 % threshold for the application of the Schumacker-benefits. Other countries apply a lower percentage.

3. CAN A HOME OFFICE CREATE A NEXUS FOR THE TAXATION OF THE EMPLOYING COMPANY?

3.1. Home offices as nexus for a permanent establishment?

In April 2020, the OECD[7] discussed whether a home office could result in the creation of a permanent establishment (PE) of the company and would thereby result in an attribution of a share of the company's overall results to the newly created permanent establishment. The OECD however explained that it is unlikely that the COVID-19 situation will create any changes to a PE determination. The exceptional and temporary change of the location where employees exercise their employment because of the COVID-19 crisis, such as working from home, should not create new PEs for the employer. Similarly, the temporary conclusion of contracts in the home of employees or agents because of the COVID-19 crisis should not create PEs for the businesses.

This view was also shared by the Austrian Ministry of Finance in a circular in which it stipulated that the home office is the result of force majeure and only temporary. However, the analysis could be different if the home office activity would turn to become the usual practice for carrying out activities.[8]

3.2. Concerns related to the residence status of a company (place of effective management)?

The OECD also raised the question about a potential change in the "place of effective management" of a company as a result of a relocation, or inability to travel, of chief executive officers or other senior executives. The concern is that such a change may have a consequential change in a company's residence under relevant domestic laws and affect the determination of the country where a company is regarded as a resident for tax treaty purposes. However, the OECD considers that the COVID-19 situation will not create any changes to an entity's residence status under a tax treaty. A temporary change in location of the chief executive officers and other senior executives is an extraordinary and temporary situation due to the COVID-19 crisis and such change of location should not trigger a change in residency, especially once the tie breaker rule contained in tax treaties is applied.

4. BRIEF OUTLINE OF APPLICABLE SOCIAL SECURITY RULES – TELEWORKING IN STATE OF RESIDENCE CAN LEAD TO A CHANGE OF THE APPLICABLE SOCIAL SECURITY SYSTEM:

In view of the close links between tax and social security and as an example of how similar issues are dealt with in other policy areas it is relevant to briefly refer to the application of the common social security rules.

The EU Regulations on the coordination of social security systems (Regulations (EC) Nos 883/2004 and 987/2009) provide that persons are subject to the legislation of only one Member State at a time. Which Member State is competent in a given situation and,

[7] https://www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/, updated in January 2021: https://www.oecd.org/coronavirus/policy-responses/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic-df42be07/

[8] Info des BMF vom 29.01.2021, 2021-0.065.761, https://findok.bmf.gv.at/findok?execution=e2s1

therefore, where social security contributions have to be paid, depends on the provisions of the Regulations. These rules are binding and it is not possible for individuals or employers to choose the applicable legislation. For economically active persons, in principle, the Member State in which they work is competent. If they normally pursue an activity in two or more Member States (e.g. for most of the year in the Member State in which the registered office of their employer is situated and for a few months from another Member State), Article 13 of Regulation (EC) No 883/2004 applies. Pursuant to it, employed persons are subject to the legislation of their Member State of residence if they pursue a substantial part of their activity there. Otherwise, the Member State in which the employer has its registered office is competent. In accordance with Article 14 of Regulation (EC) No 987/2009, as a general rule, a share of 25 % or more of working time and/or remuneration over a period of 12 calendar months is regarded as a substantial part of the activity.

Thus, working from other EU countries can indeed have consequences with respect to social security. If someone originally works only in the Member State of their employer, but then starts partially working in their Member State of residence and exceeds the threshold of 25 % of the activity, competence shifts from the former to the latter State. This means that the person concerned and their employer need to pay social security contributions there and that the person's entitlement to benefits is subject to the legislation of that State. This may be advantageous or disadvantageous in individual cases and can involve a certain administrative burden. However, the Regulations prevent double payments for the same period.

In the context of the Covid-19 pandemic, it should also be taken into account that the Administrative Commission for the Coordination of Social Security Systems agreed that until 31 December 2021 a flexible approach should be taken on issues of applicable legislation. Pursuant to Article 16 of Regulation (EC) No 883/2004, it is possible for two or more Member States to provide by common agreement for exceptions to the above-mentioned rules, i.e. to derogate from the applicable social security legislation, where this is in the interest of certain persons or categories of persons. However, they have no legal obligation to do so.

5. POSSIBLE SOLUTIONS AT EU LEVEL

In its Communication "Removing cross-border tax obstacles for EU citizens" [9] from December 2010, the European Commission concluded as follows:

> *5. CONSIDERATIONS FOR FUTURE ACTIONS*
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> *The Commission also proposes to establish a dialogue with Member States' tax administrations and stakeholders on other appropriate solutions to EU citizens' cross-border tax obstacles. Suggestions that have already been made include:*
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> - *Setting up central one-stop-shops in tax administrations where mobile workers and investors could not only seek relevant and reliable tax information, but also directly pay taxes and receive all the necessary certificates for their home country's tax authorities*

[9] COM(2010) 769 final of 20 December 2010.

- *Facilitating cross-border tax compliance by seeking greater alignment of tax claim and declaration forms, translating information into other EU official languages and making greater use of information technology*
- *Encouraging Member States to adopt special rules for frontier workers and mobile workers that take account of the interaction of tax and social security systems in different Member States*
- *Promoting better interaction between the different pension taxation regimes so as to encourage worker mobility.*

These suggestions have been confirmed by the expert group in its Report on “Ways to Tackle Cross-Border Tax Obstacles facing Individuals in the EU” and may serve as guiding principles for the present initiative.

These conclusions and the suggestions for solutions remain valid today and have gained in relevance due to the effects of the Pandemic.

6. QUESTIONS

(1) Do you have any comments on, or additional information concerning the above description of the factual situation?

(2) What are your views concerning suggested follow up actions?

(3) Do you have any suggestions for other initiatives than those suggested in this note?