



Italian-German International Tax Seminar

Information Visit 3 October 2023

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Mobility of Workers – Introduction

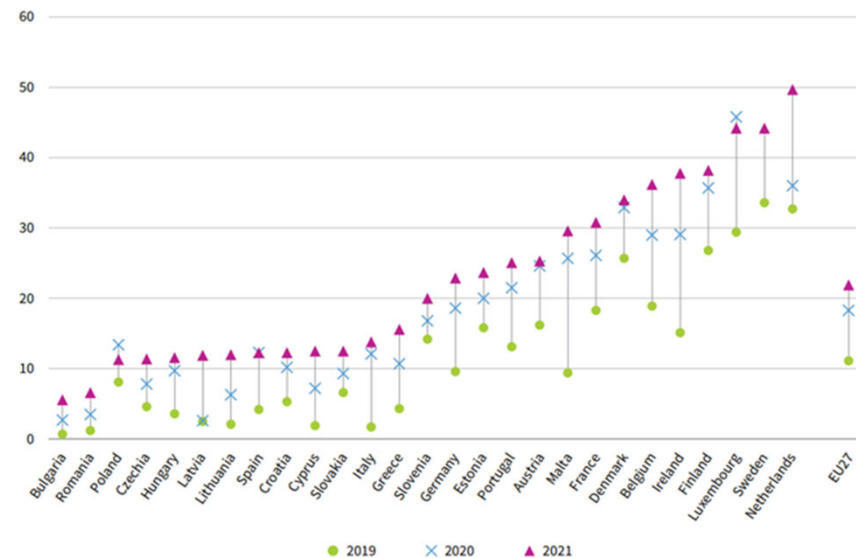
- Globalisation, increased integration of the internal market and digitalisation are important drivers behind an increase of cross-border working and teleworking.
- Remote working, teleworking and cross-border teleworking are likely to stay (e.g. references in vacancy notices) – fully remote working also expanding
- The following questions arise:
 - How did the pandemic affect cross-border workers, in particular with regard to cross-border teleworking?
 - If teleworking continues to be widely used, are the tax rules in place appropriate and sufficient?
 - If not, what could be alternative solutions ?



Telework is firmly on the rise

- Eurofound data: 41.7 million people teleworked across the EU in 2021, double the number of 2019.
- Share of employees working from home has increased from approx. 11% (in 2019) to approx. 22% (2021)

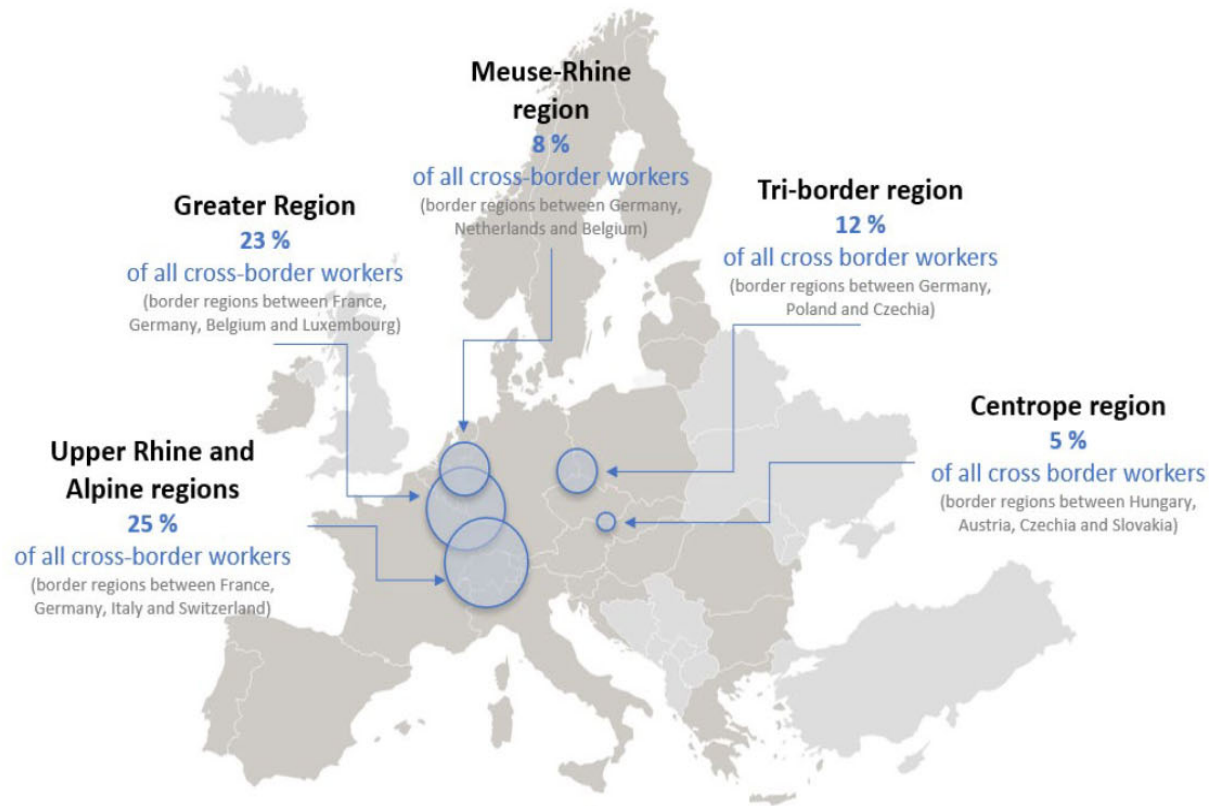
Figure 8: Share of employees working from home by country, 2019–2021, EU27 (%)



Cross-border workers: Who and where?

Main Member States of origin					Main Member States of destination		
Member State	To EU-27 (in '000)	To EFTA (in '000)	Total	% of workforce	Member State	Total (in '000)	% of workforce
FR	236	188	424	1,7%	DE	378	1%
DE	159	53	213	0,6%	CH	345	8%
PL	176	15	190	1,2%	LU	212	44%
BE	119		119	2,6%	AT	143	4%
RO	113		113	1,5%	NL	122	2%
HU	69	3	72	1,6%	BE	85	2%
CZ	64		64	1,3%			

Cross-border workers: Who and where?



How many cross-border teleworkers ?

- No statistics available – only estimations.
- The estimations are based:
 - on number of domestic regular and occasional teleworkers
 - on increase of teleworking during the COVID-19 pandemic
 - on the number of cross-border workers
- Estimations:
 - France MOT: for France: out of more than 400.000 cross-border workers, there are 125.000 regular or occasional teleworker
 - Research Prof. de Wispelaere: in total 436.000 cross-border teleworkers in the European Union

Cross-Border Teleworking

- Multidimensional issue
 - **Taxation**
 - **Social Security law:** Can cross-border teleworking result in a change of the applicable social security system ?
 - **Labour Law:** which labour law is applicable? For example: which rules apply for working hours ? What are the consequences of work accidents in homeoffice ?

Principles of Taxation of Cross-Border Workers

- Art. 15(1) OECD-MTC:
“A resident of a Contracting State in respect of an employment shall only be taxable in that State unless the employment is exercised in the other Contracting State.”
- Art. 15(2) OECD-MTC: The right to levy the taxes reverts to the State of residence if the 3 cumulative conditions are fulfilled:
 - a) The recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any 12 month period commencing or ending in the fiscal year concerned, and
 - b) The remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
 - c) The remuneration is not borne by a permanent establishment which the employer has in the other State.

Possible Tax Repercussions of Cross-border Teleworking

Cross-border teleworkers subject to taxation in the source state (the usual place of activity) and also subject to taxation in the state of residence on a pro-rata basis

<i>...for the employer</i>	<i>... for the employee</i>	<i>... for the tax administrations</i>
<ul style="list-style-type: none"> • Apportionment of income in two jurisdictions • Levying of wage tax as withholding tax in state of activity 	<ul style="list-style-type: none"> • Additional compliance obligations (need to declare income in 2 MS) • Certain thresholds may no longer be fulfilled (Schumacker-criteria) • Possible impact on overall income depending on difference in taxation in source and resident state 	<ul style="list-style-type: none"> • Apportionment results in assessing taxpayer in both states on largely the same issues (days spent in home office, auditing of wage tax requirements, disputes with taxpayer)

Teleworking in normal times - Derogations

De-minimis-thresholds agreed upon between certain Member States in DTCs

- a certain pre-defined number of days of absence from usual place of activity does not lead to an apportionment
- The number of days agreed range from **19** days to **34** days per year

Specific Cross-Border Commuter Provisions

- if certain requirements are fulfilled, in particular both place of activity and permanent home in border zone, then the state of residence maintains the taxing right
- Only few bilateral situations provide for such specific cross-border commuter provisions
- Teleworking sometimes without affecting the specific status (DE-FR), sometimes affecting (DE-AT).

Temporary Crisis Measures

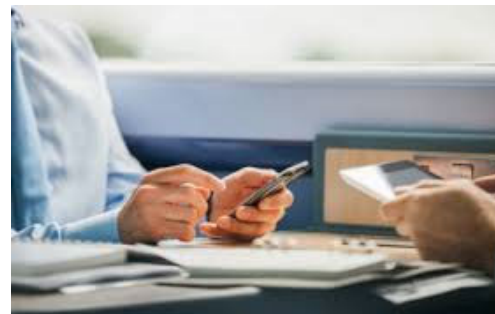


- Some Member States have agreed on temporary measures to avoid tax repercussions from the home office and teleworking during the COVID-19 pandemic
- Normally: switch of taxing right from source state to residence state
- But: under bilateral memoranda of understanding / agreements the days spent in a home office are deemed as working days spent at the usual place of activity in the other Member State
- The risk of tax repercussions due to home office and teleworking was mitigated
- But, these MoU expired at the latest by end 2022

Brief Outline of Social Security Provisions

- The EU Regulations on the coordination of social security systems (Regulations (EC) Nos 883/2004 and 987/2009): persons are subject to the legislation of **only one Member State**
- For economically active persons, in principle, the **Member State in which they work** is competent
- Employed persons are subject to the legislation of their **Member State of residence** if they pursue a substantial part of their activity there
- 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

In a nutshell: One system applicable, no apportionment, possible incentive to remain below 25% of telework to avoid SSC repercussions



Scenario 1: 100% office work



	LU	DE
Working days	220	0
Salary apportionment	100%	0%
Taxation		
Social Security		



* Under an assumption that there are 220 working days per year

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Scenario 2: 4 days home office / 1 day office



	LU	DE
Working days	44	176
Salary apportionment	20%	80%
Taxation		
Social Security		

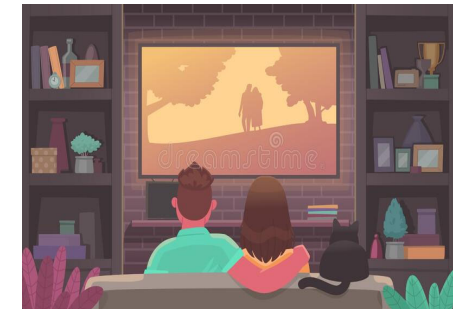


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Social Security	0%	100%



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Cross-Border Teleworking – Taxing Rights

Share of Home office of total worktime	Taxation	Social Security Contributions
100 % home office	State of residence	State of residence
4 days per week home office, 1 day in work state = 80 / 20 %	State of residence / source state	State of residence
1 day per week home office, 4 days in work state = 20 / 80 %	Source state / state of residence	Source state

Social Security Provisions: changes under way?

- During the COVID-19 pandemic and a transitional period thereafter (until June 2023): guidance note allowing to neutralize the impact of cross-border telework from the state of residence above the 25% threshold.
- Ad hoc group (AHG) was set up in September 2022 to find possible solutions to accommodate increased level of telework:
 - Short/mid-term solution : template for a multilateral framework agreement (bringing the threshold of less than 25% telework in the MS of residence to less than 50% of total working time)
 - 19 Member States / Countries signed, in force as of 01/07/2023

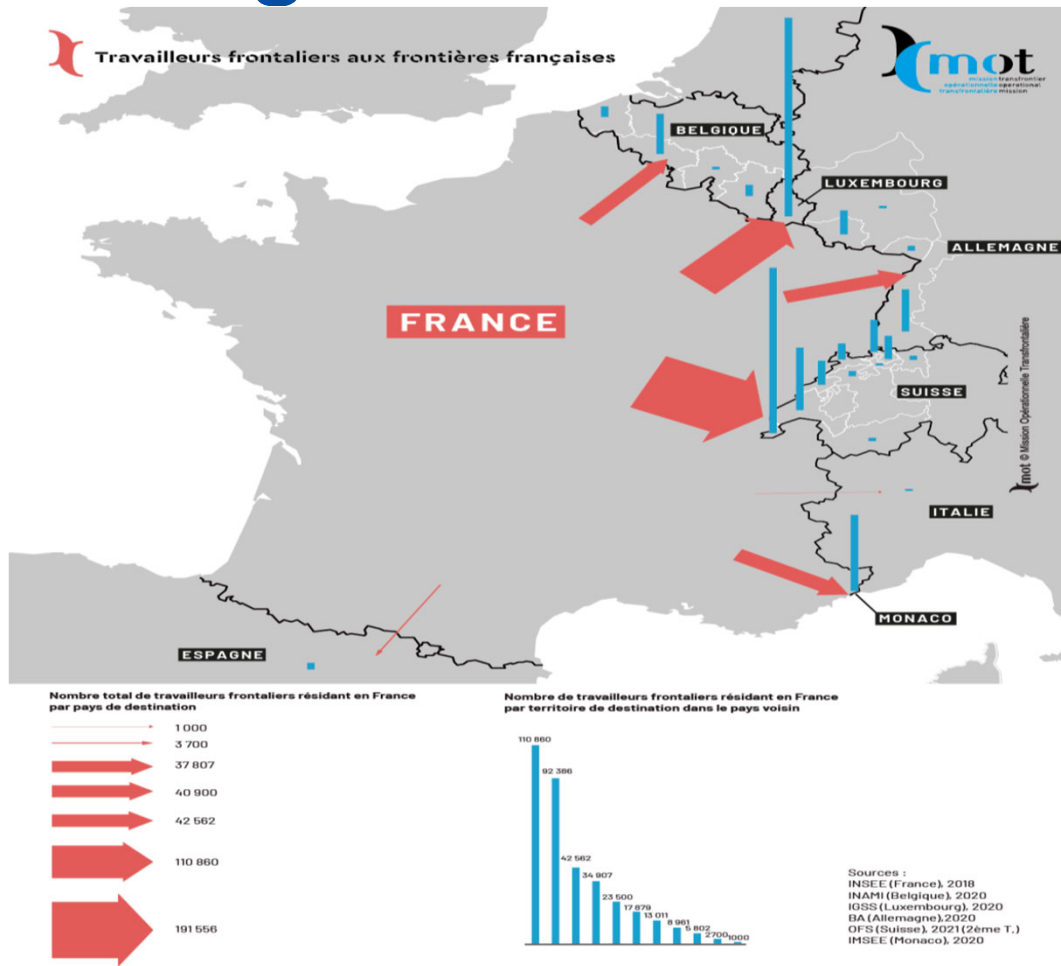
Cross-border Telework : New drivers

- Awareness of the issue and interest in finding solutions
- National examples:
 - Benelux: Recommendation 920/2 of March 2021 for a common statute for cross-border workers for social security and income tax and 48 days of telework without tax repercussions
 - Benelux: Declaration of March 2023 calls on European Union to develop a solution to the taxation and social security law related to cross-border teleworking.

Cross-border Telework : New drivers

- DG REGIO conference in January 2023 on « Vibrant Cross-border Labour Markets »
- EESC: own-initiative report on « Taxation of cross-border teleworkers and their employers » calling for 96 days of cross-border teleworking with no tax repercussion, alternatively for a one-stop-shop with financial compensation to off-set imbalances.
- European Parliament: Public Hearing on Cross-border teleworking on 9 January and Interparliamentary Conference with the Swedish Parliament on Remote Working on 28 February 2023.

The new agreement between CH and FR



The new agreement between CH and FR

rules until 1/1/2023	
General Provision under Art. 17	Provisions as in OECD-MC and apportionment for home-office
Special Agreement with 8 Western Cantons from 1983	Special frontier worker rule: Taxation in state of residence with a 4,5 % withholding on gross salary in source state; 45 days of non-return.
Special Agreement with Geneva from 1973	No frontier worker rule, general provisions apply. Geneva agreed to pay a compensation of 3,5 % of gross salaries to France.
rules as of 1/1/2023	
General Provision under Art. 17	Up to 40 % teleworking without apportionment – appropriate compensation of state of residence will be provided.
Special Agreement with 8 Western Cantons from 1983	Taxation in state of residence with a 4,5 % withholding on gross salary; 45 days of non-return <u>and</u> up to 40 % teleworking.
Special Agreement with Geneva from 1973	General provisions apply, i.e. up to 40 % teleworking without apportionment. 3,5 % compensation continues to apply (but possibly compensation by CH Confederation to Geneva).

Cross-border Teleworking: Possible Actions

- Different considerations
 - Compliance & administrative burden
 - Legal certainty
 - Financial impact on workers (tax burden)
 - Budgetary impacts for MS

Cross-border Teleworking: Possible Actions

1. Setting a *de-minimis* limit

- Cross-border teleworking without tax repercussions within set limits; avoidance of apportionment of income
- Concept exists in practice. Number of days range from 19 – 34 days per year, but: number of days insufficient for 1 day/week cross-border teleworking

Need to increase and standardise *de-minimis* limit?

Cross-border Teleworking: Possible Actions

2. Setting a *de-minimis* limit aligned with social security threshold

- Social security provisions provide for a change of applicable social security system in case of 25 % or more home office, i.e. $\approx 220 \times 25 \% = 55$ days
- Solution would allow for 1 day per week cross-border teleworking on a regular basis

Cross-border Teleworking: Possible Actions

3. Creating bilateral *one-stop-shops* for frontier workers and cross-border teleworkers

- Instead of sharing taxing rights, MS would share tax revenues
- Taxpayers would only interact with one single tax administration
- One-stop-shop could be linked to either state of source or of residence
- In a perfect world, there would be an even number of ingoing and outgoing cross-border workers and therefore no revenue effect
- The imbalances which might occur in our today's world could be offset by financial compensations to be agreed upon by Member States.

Result: reduction of administrative tax burden; cross-border tax compliance to be facilitated for taxpayer

Home Office and Creation of PE

Can home office lead to the unintentional creation of a Permanent Establishment (PE) ?

- OECD Secretariat published two guidelines in April '20 and January '21:
Conclusion: unlikely that COVID 19 will lead to unintentional creation of PEs:
- Requirements for a PE:
 - a fixed place of business
 - Not only temporary
 - Activity is going beyond an auxiliary or preparatory character
 - Premises must be at the disposal of the company

Result: normal staff in home office will fulfil these requirements only exceptionally

Home Office and Change of Residence of Company

Can home office lead to the unintentional change of place of management and thereby a change of residence of a company ?

- OECD guidelines: A temporary change in location of board members or other senior executives is an extraordinary and temporary situation due to the COVID-19 pandemic should not trigger a change in treaty residence.

OECD-WP6 priorities for 2023-2024 are likely to include:
Global mobility of workers

In a post-COVID 19 context, can home office lead to the creation of a PE?

- Assessing the home office against the criteria for a PE
- A certain degree of permanence: not of a purely temporary nature, i.e. longer than 6 months
- „at the disposal of the company“
- Para. 18 of OECD Commentary on Art. 5
 - Depends on the facts and circumstances of each case
 - If „intermittent or incidental“, then no PE
 - But: use of home office on a continuous basis and the enterprise has required the individual to use that location (no office with company), the home office may be considered to be at the disposal of the enterprise

Home Office and Creation of PE: Outcome of the WPIV meeting

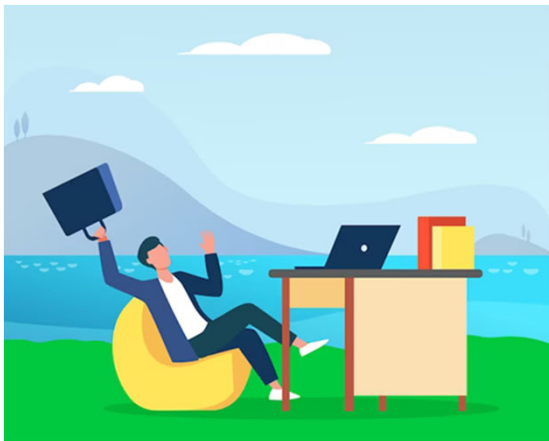
- Working Party IV meeting of 28 October 2022: detailed questionnaire on the issue of PE and home office. Main findings were as follows:
- A few Member States took the following opposite positions:
 - that either home office cannot constitute a permanent establishment (“not at the disposal”), or
 - that home office can actually be considered “at the disposal”; hence constituting a permanent establishment.
- The bulk of Member States stated that this would need to be seen on a case-by-case analysis, taking into account all elements.

Home Office and Creation of PE: Feedback from business

- According to Business community there seems to be the following trends: facts and circumstances are prevailing (i.e. case-by-case analysis).
- Common understanding that a home office is considered to be at the disposal of the foreign employer if the home office:
 - (i) is used on a continuous basis for carrying on business activities for the foreign employer and
 - (ii) the employee is contractually or de facto obliged to use his or her home office. The latter condition seems to be assumed fulfilled if the foreign employer does not provide for the possibility to use an office in the home office state.

Full Remote Working and visits to HQ

- No establishment of employer in state of residence
- Visits to Headquarter trigger apportionment
- De-minimis-limits to avoid heavy compliance burden ...



Mission to headquarter





THANK YOU FOR YOUR ATTENTION !

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35

