European Commission

Mobility of Workers

PLATFORM FOR TAX GOOD GOVERNANCE

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Mobility of Workers – Introduction

- Numbers of frontier worker and mobile worker continue to increase. Example:
  - number of frontier worker in Germany almost tripled from 2010 – 2019 (from appr. 66.000 – 190.000)
  - Grande Region: number of frontier workers increased by 25 % from 2010 to 250.000 persons today
- The following questions arise:
  - ➢ How did the pandemic affect these frontier workers (and also mobile workers) in particular with regard to teleworking?
  - ➢ If teleworking will continue to be widespread used after the Pandemic, are the tax rules in place appropriate ?
- The Commission services are currently carrying out a fact finding exercise for a comprehensive and accurate overview

Taxation of Cross-border Workers - Basics

- Cross-border Worker may be subject to income tax in 2 countries :
  - In the country of activity as a non-resident
  - In the country of residence being subject to taxation on world-wide income
- Double Taxation is avoided by the allocation of taxing rights in Art 15 OECD-MC:
- Principle of taxation of employment income: state of residence, unless the employment is exercised in the other Contracting State.
- However, Art. 15(2) subjects the taxation in state of residence to the following conditions:

is present in the state of source not more than 183 days,	*The employee is present in the source state for more than 183 days,*
and the remuneration is paid by, or on behalf of, an employer who is not resident	*or the remuneration is paid by, or on behalf, of an employer who is resident in the state of source, or*
and the remuneration is not borne by a permanent establishment which the employer has in the state of source.	*or the remuneration is borne by a permanent establishment, which the employer has in the other state*

Tax Treatment of Homeoffice and Teleworking

- Effects of Art. 15(2):

  Cross-border workers subject to taxation in the source state (the usual place of activity) will also be subject to taxation in the state of residence on a pro-rata basis.
- Important Repercussions on the tax treatment:
- **For the employer:**
  - apportionment of income on 2 jurisdictions;
  - withholding taxes on wages in two countries with corresponding compliance (also necessary adjustments);

Tax Treatment of Homeoffice and Teleworking

For the cross-border worker:

- The apportionment increases the risk of disputes on the appropriate apportionment of the income;
- Additional compliance obligations, as the citizen also needs to file a tax return for employment income in his state of residence;
- Allocation of general expenses to the income generated in each of the 2 Member States;
- Questionable whether all deductions will still be available, e.g. social security?
- Potentially loss of tax benefits, because certain thresholds are not any longer fulfilled (e.g. Schumacker threshold of 90 % in Germany for the taking into account of the personal and family circumstances).
- The situation even more complicated, if the state of residence applies 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.

Temporary Crisis Measures I

- A number of Member States have agreed on temporary measures to avoid tax repercussions from the homeoffice and teleworking.
- Impossibility for cross-border workers to carry out their work at the usual place of activity due to lock-downs or closure of frontiers
- Normally: switch of taxing right from source state to residence state
- But: Some Member States concluded 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 exist between Member States with a significant number of cross-border workers, e.g. Luxembourg and the neighbouring countries.

Temporary Crisis Measures II

- These memoranda were prolonged 5 or more times, the last as of 1 October 2021 until the end of the year 2021.

Result:

- The risk of tax repercussions due to home office and teleworking was mitigated by the memoranda of understanding concluded by the various Member States

Quid:

- Other Member States without such temporary crisis measures ?
- For the time after the temporary measures ?

Teleworking in normal times - Derogations

Some Member States have concluded in their Double Taxation Conventions de-minimis-thresholds according to which the taxing right is only allocated to the state of residence, if the employee has exceeded the number of days without presence at the usual place of activity.

Examples:

DTC Germany – Luxembourg: max 19 days per year

DTC Belgium – Luxembourg: max 24 days per year

DTC France – Luxembourg: max 29 days per year

But: de-minimis-threshold covers all absences like trainings, missions, teleworking.

no de-minimis-threshold: DTC France – Germany / DTC Belgium – France / DTC Germany – Austria / DTC Belgium – Germany

Result: the de-minimis threshold only apply in few cases. Furthermore, the threshold would not cover 1day/week teleworking

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Specific Cross-Border-Commuter Provisions

Cross-border Commuters: 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.

DTC France - Germany – no limitation to teleworking

The special provision maintains taxing right for the state of residence and 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 carried out in the border zone and therefore is not taken into account for the determination of the 45 days threshold.

DTC Austria – Germany – teleworking only within limits of 45 days rule

The special provision maintains taxing right for 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, is explicitly excluded and is therefore taken into account for the calculation of the 45-day-threshold.

Brief Outline of Social Security Provisions

- 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.
- 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, Article 13 stipulates that employed persons are subject to the legislation of their **Member State of residence** if they pursue a substantial part of their activity there. 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.

Result: currently there is a cap for teleworking of 25 % to avoid repercussions in the field of social security.

Suggestions to address Tax Repercussions I

- 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
- 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.

Suggestions to address Tax Repercussions II

- 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.

Suggestions to Address Tax Repercussions III

Source: Communication "Removing cross-border tax obstacles for EU citizens" from December 2010 – COM(2010) 769 final

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

Tax Repercussions for Employer Company

Discussion at OECD level whether:

- **Homeoffice would be a <u>nexus for a permanent establishment</u> ?**

OECD: 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.

- **as a result of a relocation, or inability to travel, of chief executive officers or other senior executives, this could results in a potential change in the "place of effective management" of a company**

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.

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