Maastricht University

Faculty of Law

Ms. Manal Corwin
Director of the OECD Centre for
Tax Policy and Administration
by e-mail to taxpublicconsultation@oecd.org

Maastricht Centre for Taxation

Maastricht
22 December 2025

Subject: Public Consultation "Global Mobility of Individuals"

Dear Ms. Corwin,

We thank you for the opportunity to comment on the public consultation document "Global Mobility of Individuals". We also welcome the OECD's decision to focus on, and address, the taxation challenges faced by individuals, recognizing the growing importance of mobility of labour.

1. Summary

In cases of mobile work, both **tax legislation** (in particular tax treaties) and **social security legislation** (within the European Union: Regulation 883/2004 and Implementing Regulation 987/2009) apply. These separate areas of legislation are characterised by differences, which will be dealt with elaborately in the sections below. To date, these areas of law are still too often considered in isolation in cases of mobile work. The consequences of this and other differences in the application of the various jurisdictions will be discussed in more detail below.

When taxing employees, current tax treaty rules follow the **place-of-work principle** and provide an exception (183-day rule) to avoid excessive administrative burdens. It is true that the nexus of physical presence (functionally related to the performance of the employment) appears to be losing importance due to technological developments. An important factor here is that teleworking enables people to replace their physical presence with a virtual presence in another state, while they are mainly behind the screen of their home computer. However, despite changing ways of work (e.g., remote work) and challenges posed by the increasing mobility of labour, the place-of-work principle is well-established, has its practical advantages (notably, an individual cannot be physically present at two different places at the same time) and should, therefore, not be hastily abandoned in favour of other questionable principles, such as the taxation of employment income at the place where the remuneration can be deducted by the employer (base erosion principle).

Instead, the place of work principle should be limited to the extent necessary to **avoid excessive administrative burdens** for employees, employers and tax authorities. In fact, the OECD Commentary on Article 15, para. 6.2 recognizes this as a key objective of the 183-day rule. However, the 183-day rule fails to avoid excessive administrative burdens in certain situations. Under the current rules, cross-border (tele)workers find themselves confronted with **high administrative obligations and burdens** (e.g., proving days of 'physical presence'), a **salary split** (shared taxing

Visiting address
Bouillonstraat 1-3
6211 LH Maastricht

Postal address
P.O. Box 616
6200 MD Maastricht
The Netherlands

T +31 (0)43 388 31 48
F +31 (0)43 388 49 07

Bank account: 065.76.18.705
IBAN: NL05 INGB 0657 6187 05
BIC: INGBNL2A
VAT identifier EU
NL0034.75.268.B01

www.maastrichtuniversity.nl
taxation@maastrichtuniversity.nl

KvK nr.: 50169181

rights between the residence state and the other state), and **discoordination** of taxes and social security and parafiscal charges adversely affecting their net income. We therefore – for purposes of standardization – propose that the OECD develops (optional) provisions to be included in the OECD Commentary or OECD Model for addressing these situations and avoiding excessive administrative burdens in a standardized manner (akin to, for instance, the pension premium provision in the OECD Commentary on Article 18, para. 37). The objective of such a provision would be to reduce administrative burdens, avoid salary splitting and, at the same time, minimise any lack of coordination with social security. The structure and drafting of such a provision is outlined in the sections below. The extent to which each of the above objectives is achieved varies depending on the type of provision (e.g., home working threshold or cross-border worker scheme).

The outlined solution approaches can be categorised as follows:

- **Situation 1**: An employee resident in a contracting state, the residence state, works most of the time in the other contracting state. However, he or she also spends a limited amount of time working at home from the residence state. Under current treaty rules, the salary is split into two parts: the remuneration for the days working at home is taxable only in the residence state, whereas the other part of the remuneration is taxable in the other state where the work is performed. To address such a situation, a ***de minimis*-provision** (home office threshold) could be introduced under Article 15 of the OECD Model. Under such a provision, a maximum of, e.g., 34 days (currently the most common) may be worked from home without taxation in the residence state. Thus, due to this home working threshold (albeit up to the maximum number of days), the right of taxation is not (partly) assigned to the residence state (where the work is performed) but to the other state (where the work is not performed). This avoids a salary split (from day 1), reduces the administrative burden (e.g., tax returns in both states) and ensures coordination between taxation and social security (both assigned to the work state) in situations of incidentally working from home.
- **Situation 2**: An employee resident in a contracting state, the residence state, works most of the time in the residence state. However, he or she also spends a limited amount of time working in the other state where the employer is resident. Under current treaty rules, the salary is split into two parts: the remuneration for the days working at home is taxable only in the residence state, whereas the other part of the remuneration is taxable in the other state where the work is performed and where the employer is a resident. To address such a situation, a ***de minimis*-provision** (head office threshold) could be introduced under Article 15 of the OECD Model. Under such a provision, a maximum of, e.g., 34 days, may be worked at the employer's head office without taxation in the other state where the employer is resident and has its head office. Thus, due to this head office threshold (albeit up to the maximum number of days), the right of taxation is not (partly) assigned to the other state (where the work is performed) but to the residence state (where the work is not performed, similar as under the 183-day rule). This avoids a salary split (from day 1), reduces the administrative burden (e.g., tax returns in both states) and ensures coordination between taxation and social security (both assigned to the residence state) in situations of incidentally working at the employer's head office.
- While the OECD Commentary or OECD Model including such an (optional) provision could leave the **relevant threshold** open for treaty negotiations, the threshold should be chosen in consideration of the social security arrangements and thresholds in force between the contracting states. Within the European Union, for instance, the Regulation 883/2004 and the Framework Agreement provide for relevant thresholds, which could also be used or incorporated into bilateral tax treaties. More specifically, to the extent social security rules

provides for options within certain thresholds, the allocation of taxing rights could depend on the option chosen to align both social security and taxation.

- Currently, Article 15 of the OECD Model relies on two criteria related to presence: where is the employee working (place of work principle) and where is the employee physically present (183-day rule). In designing any future thresholds, it is imperative to ensure that clarity exists about how those thresholds are determined (for example, if the employee is sick or visiting a client). Ideally, no new counting methods are introduced. To the extent possible, the counting methods of existing thresholds should be aligned – between taxation and social security –to avoid excessive administrative burdens and legal uncertainty.
- While these approaches and solutions would limit administrative burdens for employees, employers and tax authorities, they may potentially lead to shifts in **tax revenues** between the contracting states. To address this, macro compensation schemes for cross-border worker could be considered at the state level. One possibility would be a 'one-stop shop' in the residence state or the other contracting state in combination with a compensation scheme. The basic principle here is that the cross-border worker files a tax return and pays tax in one state, followed by a mutual settlement between the countries concerned. In this way, the tax revenues are divided between the residence state and the other state; not taxing rights. This leads to greater clarity about net income and a possible reduction in administrative burdens for employees, employers and tax authorities.

The public consultation document also raises the topic of **residence**, particularly in regard with situations that involve dual residence or no residence. Dual residence conflicts have always been more prominent in the case of individuals than legal entities, because the personal circumstances and connections of individuals may relate to more than one state at the same time. Admittedly, the personal mobility that many individuals naturally enjoy as a result of the nature of their work or personal life in the backdrop of a globalized world augments the potential for dual residence conflicts. Article 4(2) of the OECD Model remains an adequate tool to address these. Conversely, we elaborate below that situations where an individual is not a resident of any state are rare, including in the case of those individuals that enjoy the highest degree of mobility, such as digital nomads.

Additionally, the public consultation document raises the issue of **excessively low or non-taxation**. The interactions between domestic tax systems create gaps which may be exploited by states who create favourable tax regimes to attract skilled workers, wealthy investors and pensioners. This can result in no or excessively low taxation and ultimately the shifting of income to such states. Non-tax policies, such as residence- or citizenship-by-investment schemes and digital nomad visas, can exacerbate this by facilitating (tax-induced) mobility.

Concludingly, this input document addresses **non-competition clauses**, which proof to be more prevalent in OECD countries than previously assumed and may have a significant impact on labour mobility. Such clauses not only appear in employment contracts but also in exclusive services agreements and franchise arrangements. Literature research reveals several shortcomings in the application of the OECD Commentaries on art. 15, particularly with regard the allocation of taxing rights, and the calculations required. Where non-compete payments are treated as severance payments, additional OECD guidance could help address existing shortcomings and reduce interpretative divergences. Similarly, issues relating to the characterisation and allocation of non-compete payments in business-to-business contexts require further guidance, given their relevance to exclusive services, remote services, and, beyond the longstanding challenges, distribution and franchise agreements, among others.

2. Specific comments

In response to questions 2(a), 2(b), 2(c), 2(d) and 2(f), we would like to point out the following.

2.1. Applicable regulations: assigning taxing rights and allocating social security competence

With regard to cross-border employment, Article 15 of the OECD Model applies in terms of taxation. In the standard situation where an employee lives in one country and works for an employer in another country where the employer is also established (resident), the country where the employment is (physically) exercised is the competent country for taxation. In the case of working from home, Article 15(1) of the OECD Model thus allows the country of residence to tax the days worked in that country. In the case of working in the other country, Article 15(1) of the OECD Model allows the other country to tax the days worked in that country (the 183-day rule does not apply if the employer is resident in that other country). A salary split occurs between the country of residence and the other country. Depending on the circumstances and the applicable national (tax) regulations, this may be advantageous or disadvantageous for the cross-border worker concerned.

With regard to social security, Regulation 883/2004 and its implementing regulation, Regulation 987/2009, apply in cross-border situations within the European Union. When working in two or more Member States, the rule applies that if 25% or more of the working time and/or remuneration is acquired in the country of residence, the country of residence is the competent state to levy contributions (on the entire income), in accordance with Article 13(1)(a) of Regulation 883/2004 in conjunction with Article 14(8) and (10) of Regulation 987/2009. Conversely, if this is not the case, the country of activity is the competent state – also in terms of levying contributions (on the entire income) – pursuant to Article 11(3)(a) of Regulation 883/2004.

At the end of 2023, the Administrative Commission concluded the so-called Framework Agreement. This is an agreement based on Article 16 of Regulation 883/2004, which allows a frontier worker to work less than 50% in the country of residence under certain conditions without switching the insurance obligation from the country of work to the country of residence. The Framework Agreement applies only to employees and not to self-employed persons. Both the country of work and the country of residence must have signed the agreement. Twenty-two countries, including Norway, Liechtenstein and Switzerland, have signed the agreement.[1] Unlike the implementing regulation, the agreement only refers to working time and not to remuneration as a criterion for the relevant threshold of 50%. In addition, there are still many questions of interpretation regarding the relationship between Regulation 883/2004 (less than 25% of professional activity in the country of residence) and the Framework Agreement. The latter only applies to teleworking between 25% and 49% of total working time, excluding other professional activities in the country of residence, such as training, visits to customers, travel in the country of residence, etc.

2.2. Administrative obligations / days of presence / work evidence

As pointed out on p. 6, para. 12 of the public consultation document, different forms of cross-border working may also have tax administration and compliance implications, which might deter some businesses or individuals from pursuing cross-border work. In particular, with regard to detailed record-keeping of days spent working in each jurisdiction, employees and employers are confronted

[1] https://socialsecurity.belgium.be/en/internationally-active/cross-border-telework-eu-eea-and-switzerland.

with high administrative burdens. This is particularly relevant in view of the (compliance) application of Article 15(1) of the OECD Model under a salary-split and the avoidance of double taxation.

An additional problem in case of salary split is the burden of proof of which (part of the) days have to be taken into account. In the event that in a bilateral situation the tax administration requests extensive evidence to demonstrate working in the state of employment, this leads to an increased administrative burden for the cross-border worker. Guidelines for this would be desirable.

Rules of evidence differ from country to country, which leads to uncertainty for the cross-border worker concerned regarding their administrative obligations towards the tax authorities. In this context, reference can be made to the *Vademecum* (explanatory document) concluded between Belgium and Luxembourg.[2] This document sets out common rules on the control of cross-border workers, which offer all parties involved greater legal certainty regarding physical presence on the territory of a state. It also provides a non-exhaustive list of documents that may be accepted as evidence. It establishes a gradation in the evidence to be provided, depending on the nature of the work performed by the employee: (i) employees who perform an activity that requires their presence at the workplace (it is impossible for these persons to perform their activity elsewhere), (ii) employees who perform an activity that does not require or is unlikely to require their presence at a fixed workplace (this will usually involve itinerant professions), and (iii) employees who perform an activity that requires them to work at a fixed workplace, but which may also involve working away from the workplace (at home or elsewhere). Although the *Vademecum* relates to Belgian-Luxembourg relations, its principles also apply to relations with other countries.

2.3. Discoordination between taxation and social security

In cases of cross-border work, both tax legislation (in particular tax treaties) and social security legislation (e.g. Regulation 883/2004 and Implementing Regulation 987/2009) apply. These separate areas of legislation are characterised by differences. For example, while the social security regulation designates the competent state on the basis of exclusivity (only one state is competent), tax treaties may assign shared taxation rights (both the state of residence and the source state may levy tax). Furthermore, the social security regulation relates to activities performed by (indivisible) persons, whereas tax treaties allocate (divisible) income. These differences can lead to a lack of coordination, i.e. the right of taxation is allocated to a state other than the one where social security contributions are levied. The consequences of this and other differences in the application of the various jurisdictions (e.g. in the application of the allocation rule) will be discussed in more detail below.

In cross-border cases discoordination between taxation and social security might arise. Notably, different thresholds are used for taxation and social security purposes. With regard to social security, the Framework Agreement refers to a percentage of more than 50% of the total working time in order for there to be a switch of the competent state (in terms of social security) from the state of employment to the state of residence. The leading criterion is ‘working time’. It should be noted that Article 14(8) of Regulation 883/2004 on the regular application of the 25% criterion applicable to work in two or more Member States refers to ‘working time and/or remuneration’. We assume that, due to its complexity, the element of ‘remuneration’ has been omitted from the Framework Agreement. With regard to taxation, days of ‘physical presence’ (functionally related to the performance of employment activities) are generally used for calculation purposes. From the first day of working

[2] Kamerstukken II 2001/02, 28259, nr. 3 (memorie van toelichting).

from home, as it were, there is a switch from the taxing authority of the regular state of work (in the following: the working state) to that of the country of residence.

A solution for discoordination between taxation and social security could entail one similar to Article 14(3) of the Netherlands-Germany Tax Treaty. This provision assigns the taxing right exclusively to the employee's country of residence state, in cases where his or her remuneration is paid by a cross-border industrial park located in the area where the common border between the Netherlands and Germany runs. However, if social security (under Regulation 883/2004) is allocated to the other state (working state), the remuneration may be taxed in the other state. It is to be welcomed that the effect of the provision depends on the applicable social security system. In other words, coordination between taxation and social security is achieved as much as possible. Such a provision could be included as an optional provision in the OECD Commentary on Article 15. Such a (proposed) arrangement is not entirely new. When the former 1970 Netherlands-Belgium Tax Treaty was replaced by the 2001 treaty, the Netherlands was in favour of – in the context of comprehensive coordination between taxation and social security contributions – making the coordination rules of the old Regulation 1408/71 to be decisive for the allocation of taxing rights over earned income. This was to replace the cross-border worker arrangement applicable under the 1970 treaty, which led to a lack of coordination. However, at that time, Belgium was unable to agree to this proposal.[3]

Furthermore, the old Regulation 1408/71 also included a provision on a common border. Article 14(3) of Regulation 1408/71 stated: 'A person who pursues an activity as an employed person in the territory of a Member State for an undertaking whose registered office is in the territory of another Member State, where the common border between those States is crossed by that undertaking, shall be subject to the legislation of the Member State in whose territory the undertaking has its registered office.' This provision has not been retained in Regulation 883/2004.

2.4. Salary split

The application of a tax treaty results in a salary split in the event that the cross-border worker works from home. As a result (under the equivalent of Article 15 of the OECD Model), part of the income may be taxed in the working state and part in the residence state. If the salary for the work performed in the working state has not been specifically determined, it will have to be derived from the total salary paid by the employer. In such cases, a pro rata calculation will have to be made to determine which part of the remuneration is attributable to which activities.[4]

Furthermore, as a result of the salary split, the taxable proportion of the cross-border worker's income in the work state may fall below the qualifying threshold to be treated as a domestic taxpayer or qualifying foreign taxpayer (e.g. in the Netherlands and Germany 90%, in Belgium 75%). The term 'qualifying foreign taxpayer' refers to foreign taxpayers (not resident in the working state) who earn the majority of their income in the working state. This treatment is rooted in the Schumacker doctrine.[5] They may lose these facilities due to the salary split, with significant consequences for

[3] See also P.J. Wattel, 'The Schumacker Legacy: Taxing Non-Resident Employees: Coping with Schumacker', European Taxation IBFD 1995, vol. 35, pp. 347-353 (353).
[4] Avenant 31 August 2021, available via https://fin.belgium.be/sites/default/files/media/documents/vademecum-bewijsvoering-luxemburg.pdf.
[5] CJEU 14 February 1995, C-279/93, ECLI:EU:C:1995:31 (Schumacker). Building on this, in its judgment X of 9 February 2017 (C-283/15), the Court of Justice of the European Union ruled that a working state must take into account the personal and family situation of a taxpayer who has no income in his residence state from which he could deduct his expenses, even if he earns less than 90% of his income in the working state. In that case, the taxpayer is entitled to a deduction in the working state in proportion to the income he earns in that country. This case concerned a taxpayer who lived in Spain and earned 60% of his income in the Netherlands and 40% of his income in Switzerland.

their net income. This concerns personal deductions, allowances and reductions based on marital status or family composition, e.g. mortgage interest relief or tax credits. For example, a cross-border worker living in Belgium works in the Netherlands. As long as he did not work from home in that situation, 90% of his income was taxable in the Netherlands and he received mortgage interest relief in the Netherlands for his home in Belgium. From the moment he starts working from home two days a week, his taxable income in the Netherlands falls below 90% and, in principle, he loses his mortgage interest relief (due to the salary split). These kinds of adverse consequences of working from home raise many questions for cross-border workers. How this can be remedied in cross-border situations, e.g. through the allocation of taxing rights to only one contracting state, compensation schemes and/or non-discrimination provisions in tax treaties, deserves further investigation.[6]

As already pointed out above, a comprehensive solution to cross-border employment needs to be found by considering the legal domains of taxation and social security in conjunction. Only then, an adequate solution seems to be at hand, especially with regard to legal certainty, administrative obligations and discoordination. An argument for considering tax and social security contributions in conjunction is that some states finance the social security not by means of social security contributions but by means of taxation (e.g. Nordic States and Spain), adversely affecting mobile worker's net income. Due to the strict separation between the two legal domains, parafiscal charges also deserve attention. A recent example in this regard is the parafiscal levy encountered by Belgian cross-border workers when partly working from home. If they are subject to a salary split under the relevant tax treaty, they are partially liable for tax in Belgium. Currently, they are liable for the Special Social Security Contribution (hereinafter: BBSZ) in Belgium. If they mainly work in the Netherlands, however, they are insured in the Netherlands if the Framework Agreement is applied. The Belgian tax authorities levy the BBSZ. The amount of the levy depends on the salary and family situation and is used to finance social security. This BBSZ is collected via the personal income tax assessment. This seems contrary to Regulation 883/2004, as the regulation has exclusive effect, i.e., only one legislation is designated as applicable. The Court of Justice of the European Union (CJEU) applies the criterion that the contribution has a direct and sufficiently relevant connection with the social security system and therefore falls within the scope of the regulation.[7] Applying European case law to the BBSZ, it can be argued that if the tax levy has a direct and relevant connection with some of the branches of social security referred to in Article 4 of Regulation 1408/71 (old) and Article 3 of Regulation 883/2004, the levy falls within the scope of the regulation. This would mean that if a cross-border worker is insured in the Netherlands, Belgium would not be allowed to levy the BBSZ. In light of this, a possible optional provision in the OECD Commentary on Article 15 should also take account of these parafiscal charges (which serve to finance social security). For the classification of such charges, reference can be made to the consistent line taken by the CJEU, creating more coordination between taxation and social security, both forming part of the 'tax wedge'.[8]

---

[6] Residents of Belgium can invoke both the scheme for qualifying foreign taxpayers and the non-discrimination clause in the Netherlands-Belgium Tax Treaty (2001). In principle, the non-discrimination clause in the tax treaty entitles them to a pro rata approach. Pursuant to Article 26(2) of this treaty, residents of Belgium are entitled to Dutch personal deductions, allowances and reductions based on marital status or family composition that apply to residents of the Netherlands in proportion to the Dutch income to the worldwide income.

[7] https://www.dekamer.be/doc/CCRI/pdf/56/ic041.pdf.

[8] https://www.lachambre.be/FLWB/PDF/55/2158/55K2158001.

2.5. Minimizing the effect of working from home: other possible solutions

In light of the above, the question arises as to how the effect of working from home on taxation can be mitigated or reduced. Various existing mechanisms and arrangements will be examined below.

2.5.1. Compensation schemes at state level (macro-clearing mechanisms)

With a view to reducing administrative burdens for employees and employers, avoiding salary splitting and neutralising the effects of working from home on tax treatment as much as possible, 'one-stop shop'-schemes in the country of residence in combination with a macro compensation scheme can be considered, i.e. macro clearing mechanisms.[9] The basic principle here is that the cross-border worker files a tax return and pays tax in one state (residence state or working state), followed by a mutual settlement between the countries concerned. In this way, it is not the taxing rights but the tax revenues that are divided between the residence state and the working state. This leads to greater clarity about net income and a possible reduction in administrative burdens for employees and employers.

In the absence of a home working threshold, the increase in home working and the taxation of home working days in the country of residence leads to a shift in tax revenues compared to a situation in which the employee does not work from home. A home working threshold in itself may also lead to a perceived shift in tax revenues compared to an allocation of taxing rights under the current rules of Article 15 of the OECD Model, as the state of employment may levy tax on (a small proportion of) the income that can be attributed to the work carried on in the state of residence. The distribution of the resulting tax revenue does not necessarily have to be regulated at the level of the individual taxpayer (through a shared taxing right between the residence state and the state of work), but can also be regulated between the governments of the countries concerned, i.e., macroeconomic settlement.

Protocol II of the 2001 Netherlands-Belgium Tax Treaty provided for such a settlement. The compensation was calculated based on a number of variables.[10] From 2018, the Luxembourg-Belgium Tax Treaty includes an exception for cross-border workers who work in their country of residence. In addition, since the early 2000s, a system has been in place whereby Luxembourg provides annual financial compensation to Belgium for the benefit of Belgian municipalities (in the form of surcharges on the personal income tax of those municipalities) with a high number of cross-border workers working in Luxembourg.[11] The financial compensation was originally set at € 15,000,000. After

[9] See also P.J. Wattel, 'The Schumacker Legacy: Taxing Non-Resident Employees: Coping with Schumacker', European Taxation IBFD 1995, vol. 35, pp. 347-353 (353).

[10] The net tax revenue for the Netherlands was set at 20% of the Dutch tax and social security contributions owed by Belgian residents in respect of wages and other income to which they were entitled under Article 15 of the treaty, and for Belgium at 20% of the Belgian tax payable by residents of the Netherlands in respect of wages etc. that were allocated to Belgium for taxation pursuant to Article 15 of the treaty. Based on the figures for 1998, the amount included in the macroeconomic settlement on the Dutch side would amount to approximately € 36.3 million; this amount was calculated according to the formula (€ 20,420 (average wage) minus € 3,630 (average amount of the tax-free allowance)) x 36.35% (rate according to the first bracket including social security contributions) x 30,000 (number of Belgian employees working in the Netherlands) x 20% (percentage of pure tax revenue). Based on the figures for 1998, the amount to be included in the macroeconomic settlement on the Belgian side would be approximately € 6.8 million; this amount was calculated using the formula (€ 20,637 (average wage) x 27.43% (average percentage of withholding tax on the converted monthly wage of employees according to scale I and according to scale II according to the rules applicable to the year 1998) x 6000 (number of Dutch employees working in Belgium) x 20% (percentage of net tax revenue). Protocol II then stipulated that 50% of the amounts included in the macroeconomic settlement by Belgium and the Netherlands respectively would be settled in favour of the Netherlands and Belgium respectively in a current account. With the 50/50 distribution used and the application of the 20% rate to Belgian tax revenue, the macroeconomic settlement resulted in an annual amount of approximately € 13.61 (ƒ30 million) in favor of Belgium over a period of five years.

[11] https://www.lachambre.be/FLWB/PDF/55/2158/55K2158001.
Pdf.

several rounds of negotiations, the amount of compensation has been significantly increased, from the base amount of € 15,000,000 to € 30,000,000 from 2015 onwards.

2.5.2. Raising the home office-threshold: tax treaty France–Switzerland as a best practice

With a view to maximizing coordination between taxation and social security, the arrangement that exists between France and Switzerland serves as an example for a new optional provision in the OECD Commentary on Art. 15. The arrangement, which applies from 1 January 2023, stipulates that a cross-border worker can work up to 40% of his annual working time in his home office without a switch of taxing rights (taxing right remains with the working state).[12] It should be noted that the various cantons in Switzerland have their own cross-border worker arrangements, with some opting for taxation in the country of residence and others for taxation in the working state. For example, employees in the cantons of Bern, Solothurn, Basel-Stadt, Basel-Land, Vaud, Valais, Neuchâtel, and Jura are subject to residence taxation.[13] They may work from home for an employer in the other state for up to 40% of their annual working hours. The 40% home working rule in the treaty between Switzerland and France states that teleworking activities carried out by an employee in their state of residence are deemed to have been carried out in the (other) state where the employer is established, provided that the teleworking activities do not exceed 40% of the working time per calendar year.[14] However, this is offset by a compensatory tax for the state of residence. The state of employment, which has the right to tax, must compensate the state of residence of the employee for 40% of the tax due on the allowances for work performed from the state of residence in the form of telework. This compensation amount must be transferred by the competent authority of one state to the competent authority of the other state by 30 June of the year following the year in which the allowances were paid.[15]

The canton of Geneva is an exception to this, as a special agreement has been in force since 1973. In particular, cross-border workers who live in France (only those who live in the departments of Ain and Haute-Savoie) and work in the canton of Geneva are subject to withholding tax in Switzerland on their entire Swiss salary. Cross-border commuters who work in the canton of Geneva can now work up to 40% of their annual working time from their home office in France without changing their cross-border commuter status and thus causing a change in the taxation of their salary. In this case, the entire salary from Switzerland remains subject to Swiss withholding tax. If they exceed the 40% threshold, this will adversely affect their cross-border worker status or cause them to lose it. The budgetary interests in that region are significant. In 2025, there will be more than 234,000 cross-border workers living in France and working in Switzerland in the France-Switzerland relationship, and more than 66,000 in the Germany-Switzerland relationship.

2.5.3. Amending protocol tax treaty Netherlands–Germany: 34-day threshold

Reference should also be made to the amended tax treaty Netherlands-Germany. The amendment protocol to the tax treaty between the Netherlands and Germany – which will enter into force on 1

---

[12] Verständigungsvereinbarung zwischen den zuständigen Behörden der Schweiz und Frankreichs über die Modalitäten der Regelung für die Ausübung von Telearbeit im Rahmen des Abkommens vom 9. September 1966 zwischen der Schweiz und Frankreich zur Vermeidung der Doppelbesteuerung auf dem Gebiet der Steuern vom Einkommen und vom Vermögen und zur Vermeidung von Steuerbetrug und Steuerflucht, available via https://www.estv.admin.ch/estv/de/home/internationales-steuerrecht/internationale-laender/sif/frankreich.html#1768690622.

[13] Article 17(4) France-Switzerland Tax Treaty.

[14] Zusatzprotokoll zum Abkommen über die Ausübung unselbständiger Erwerbstätigkeit in Form von Telearbeit, in force since 24 July 2025, available via https://www.fedlex.admin.ch/eli/cc/1967/1079_1119_1113/de.

[15] Nr. 5 Zusatzprotokoll zum Abkommen über die Ausübung unselbständiger Erwerbstätigkeit in Form von Telearbeit, in force since 24 July 2025, available via https://www.fedlex.admin.ch/eli/cc/1967/1079_1119_1113/de.

January 2026 – marks an important shift in the tax treatment of cross-border teleworking.[16] The introduction of Article 14(a) of the treaty is intended to create a simplification mechanism whereby, in the case of a limited number of home working or remote working days, the right of taxation remains with working state. This threshold arrangement is thus intended to perpetuate the application of Article 15 of the OECD Model and to prevent salary splitting – and the associated administrative burdens. However, on closer legal examination, the arrangement appears to be only a partial solution to the complex problems created by the structural increase in hybrid forms of work.

Firstly, the chosen threshold is quantitatively limited. The 34-day rule does not reflect the increased frequency of working from home, nor does it reflect comparable rules in other bilateral relationships (such as the 40% rule in the France-Switzerland Tax Treaty).
Secondly, there is structural discoordination between the tax threshold rule and the applicable social security rules, in particular the 25% limit of Article 13(1)(a) of Regulation 883/2004 and the 50% rule of the Framework Agreement. The differences in measurement units (days versus working hours) and threshold levels lead to considerable legal uncertainty about the applicable jurisdiction and risks of double premium levies. This means that the intended coordination between tax and social security regimes is not achieved.

Thirdly, the scheme introduces new interpretation and evidence problems. The required minimum duration of 30 minutes for a working day to be recognized, as well as the exclusion of on-call duties, deviate from the traditional interpretation of treaty terms in Article 15 of the OECD Model, in which physical presence is considered a clear point of reference. This deviation exacerbates the likelihood of divergent national interpretations. In addition, the broad material scope – now that remote working in third countries is also covered by the regulation – leads to a multi-layered interpretation of the treaty that does not promote practical applicability.

Fourthly, so-called triangular situations (work in a third country) entail considerable complexity. The simultaneous application of multiple bilateral tax treaties increases the likelihood of inconsistency in the allocation of taxing rights and complicates the application of prevention methods. These bottlenecks point to a deeper structural problem: the classic nexus of physical presence on which Article 15 of the OECD Model and traditional bilateral treaties are based is increasingly out of step with the reality of modern cross-border employment relationships.

2.5.4. Cross-border worker schemes: residence state taxation

In order to avoid administrative burdens and unfavourable net income effects, some bilateral treaties have introduced a so-called cross-border worker scheme. Under these schemes, an exclusive residence tax applies, subject to certain conditions. In the context of the above, the question also arises as to the extent to which working from home (or a work-from-home arrangement) affects existing cross-border worker arrangements.

The details of these rules vary, but what they have in common is that they deviate from the general rule that income from employment is taxed in the state of employment, and that they stipulate that the remuneration of cross-border workers is taxable exclusively in the state of residence, even if the requirements of Article 15(2) of the OECD Model are not met. The main disadvantage of such a cross-

[16] For a thorough analysis of this amendment, see M.J.G.A.M. Weerepas & S.P.M. Kramer, 'De thuiswerkdrempel in het wijzigingsprotocol Belastingverdrag Nederland-Duitsland: Anachronistisch maar hoe kan het anders?' MaanbladBelasting-Beschouwingen 2025 14/44.

border arrangement is the lack of coordination with social security, which is generally assigned to the state of employment. Instead, a number of conventions aim to eliminate tax (net income) disadvantages for cross-border workers by means of a compensation arrangement, e.g. the tax treaties Netherlands-Germany 2012, Netherlands-Belgium 2025.

Under Article 15(6) of the Germany-Austria Tax Treaty, a residence tax also applies to cross-border workers. This requires that the taxpayer has his/her residence in a state close to the border and usually performs his/her work near the border. It is therefore irrelevant whether the employee works in the border area of the country of residence (e.g. in a home office) or in that of the other contracting state (e.g. on the employer's premises). This means that days worked from home do not become working days that could give rise to a salary split. The right of taxation remains with the country of residence as long as the employee lives and works near the border, regardless of which side of the border. In accordance with the first sentence of point 8 of the Protocol to the Agreement, the term "close to the border" includes municipalities whose territory lies wholly or partly within a zone of thirty kilometres on either side of the border (border area). The municipalities concerned are listed in Annexes 1 and 2 to this Consultation Agreement. A minimum number of border crossings is therefore not required. According to the second sentence of point 8 of the Protocol to the Agreement, the activity is normally carried out in the border area when the person concerned works wholly or partly outside the border area for no more than 45 working days per calendar year. In addition to the 45-day limit, the days spent outside the border area may not exceed 20% of the actual working days in the context of the relevant employment relationship during a calendar year, in accordance with clause 8, sentence 3, of the Protocol to the Agreement. When calculating the limit, all actual working days must therefore be determined in a first step and the maximum limit of 20% applied in a second step.

Home working also has no direct impact under the cross-border worker scheme laid down in Article 13(5) of the 1961 Germany-France Tax Treaty. On this basis, a residence tax applies provided that the taxpayer can be classified as a "cross-border worker". These are people who work in the border area of one contracting state and have their permanent residence, to which they usually return every day, in the border area of the other contracting state ("frontier workers"). The taxpayer must live in the Alsace region (department 67 or 68) or Moselle (department 57) and the employer's business must be located in the border region (within a straight line of thirty kilometres from the French-German border). Furthermore, the taxpayer must return home every working day (with a de minimis rule of up to 45 working days per year). The tax levied by the residence state is offset by a compensation levy for the working state. This compensation is set at 1.5% of the total gross annual salary of frontier workers.

It should be noted that the main disadvantage of such cross-border arrangements is that they create discoordination with social security, as this is generally assigned to the working state. The above demonstrates that working from home under such arrangements does not necessarily have an effect on the allocation of taxing rights. When drafting an optional provision to be included in the OECD Commentary on Article 15, one should be mindful of this.

3. Personal income tax: fact patterns arising from global mobility that are creating more than one tax residence for an individual, creating risks of no tax residence, or resulting in low or non-taxation

The residence principle establishes a strong personal connection between an individual and a state. This connection serves as a justification for that state to impose tax over the individual, generally on a comprehensive basis. There are very few states that follow a territorial approach for the taxation of individuals. These include, for example, Hong Kong, Singapore, and Malaysia. Domestic law determines whether an individual is a resident in a given state, and double tax conventions will respect this qualification, subject to some exceptions, the most notable of which concerns the application of a tie-breaker rule.

Since the 1963 Draft Model Convention, the Committee of Fiscal Affairs has consistently held that it is rare for companies and other legal entities to be subject to tax as a resident in more than one state.[17] The Committee also noted that cases involving dual-resident companies often involve aspects of tax avoidance.[18] Conversely, in the case of individuals, dual residence conflicts may be considerably more prevalent, and occur as a combined result of the mobility that individuals enjoy in normal life and the mismatches or overlaps in the definitions of residence applied under the domestic laws of the states involved.

Under domestic law, most states define the residence of individuals based on extended physical presence, facts and circumstances that are taken to reveal a relevant degree of personal attachment between the person and the state, or a combination of these approaches. The most common personal circumstance that identifies such personal attachment is the availability of a (permanent) home or dwelling – a criterion that tax authorities tend to interpret very broadly. Because of the nature of the residence principle as a test of personal attachment, any type of personal circumstance may be construed as relevant. For example, in the Netherlands, tax authorities may consider whether an individual is registered with a Dutch insurer or general physician, or if their children follow education in the Netherlands.[19] In this respect, the threshold for residence is often deceptively low. Still, the high degree of mobility that individuals enjoy (e.g., situations where an individual lives in one state but works in another) result in dual-residence conflicts, especially where the circumstances taken into consideration to make this determination are construed broadly.

A number of countries also offer residence by investment or golden visa schemes. Such schemes are available, for example, in Greece, Malta, Cyprus, Portugal, as well as many non-EU states, such as the UAE and the United States.[20] Although it is increasingly less common for countries to offer direct citizenship by investment programmes, golden visas usually act to expedite the process of acquiring citizenship. Importantly, while many residence by investment schemes pose risks, such as circumventing the CRS or facilitating access to low income taxation, it should be noted that not all such schemes are created equal. For example, the now-defunct Dutch admission scheme for foreign investors (discontinued in 2024) required significant substance. Beyond a minimum investment of EUR

---

[17] Paragraph 23 of the Commentary on Article 4 of the 1963 Draft Convention; OECD BEPS Action 6 Final Report, paragraph 46.
[18] Paragraph 23 of the Commentary to Article 4 of the 2017 OECD Model Tax Convention.
[19] Netherlands - Information on residency for tax purposes, available via https://www.oecd.org/content/dam/oecd/en/topics/policy-issue-focus/aeoi/netherlands-tax-residency.pdf.
[20] US Citizenship and Immigration Services, available via: https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program.

1.25 million, the scheme required the investment to generate demonstrable added value to the Dutch economy, measured through the creation of at least 10 jobs within 5 years.[21]

Although such golden visa schemes continue to apply in some countries, there is an emerging trend towards the abolishing of these frameworks in many countries. Besides the Netherlands, other countries that have discontinued their residence by investment schemes in recent years include Spain, Ireland, and Bulgaria. The EU has played a pivotal role in driving this trend, highlighting the tax and non-tax risks raised by golden visa schemes, and urging Member States to repeal these.[22] Additionally, in April 2025, the CJEU ruled that Malta's citizenship by investment scheme was incompatible with the principle of sincere cooperation, and resulted in the commodification of EU citizenship.[23] However, the CJEU has not ruled on the compatibility of residence by investment schemes with EU law.

Dual residence conflicts may occur where the individual becomes a resident of a state pursuant to a golden visa scheme, but maintains relevant personal ties to another state (e.g., the state where the person ordinarily lives, invests, or has their family life). However, double tax conventions generally address these overlaps effectively, as tie-breaker rules emphasize substantive elements of personal attachment, which will normally not exist in relation to a state where residence was merely acquired by means of an investment.

By contrast to dual residence conflicts, which often arise as a natural consequence of the individual's mobility, situations where an individual is not a resident of any state are generally rarer. There are at least two basic reasons for this. Firstly, as already mentioned, the thresholds applied to determine that an individual is a resident of a state are effectively low, as a result of the broad interpretation of the facts and circumstances that may reveal a relevant personal attachment between an individual and a state. In practice, it can be difficult for an individual to sever all relevant personal ties to a state. Secondly, there are few real advantages enjoyed by an individual who is not a resident of any state. The most widely discussed fact pattern involving situations of no residence concerns digital nomads or perpetual travellers. These are generally understood to be individuals who carry on their work remotely and travel consistently between countries, without establishing a lasting personal connection to any of those countries. The digital nomad lifestyle is made possible by a combination of factors: the nature of the person's work, which does not require physical presence in a specific location, technology, and low costs of travel and living in host countries. It bears noting that no single, authoritative definition of digital nomadism exists, and the term tends to be used colloquially to encompass all individuals whose work and personal life entails a significant degree of mobility.

Mere nomadism could be introduced as a distinct category of taxpayers, to refer, for example, to individuals who temporarily work and live in different countries, without performing services remotely or through technological means. For example, a salesman who travels throughout a number of countries, spending a few months in each country to market a product, could just as well be described as a nomad. Similarly, a site engineer or a group of construction workers commissioned to work on a series of projects in different countries could also be described as nomads. In this respect, the basic

[21] Netherlands Enterprise Agency, available via: https://english.rvo.nl/subsidies-financing/seed-capital/admission-scheme-foreign-investors.
[22] European Parliament, 'Citizenship and residence by investment schemes', available via: https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-citizenship-and-residence-by-investment-schemes?sid=6001#:~:text=European%20Commission%20Response,posed%20by%20investor%20residence%20schemes ; European Commission, 'Questions and Answers on the Report on Investor Citizenship and Residence Schemes in the European Union', available via: https://ec.europa.eu/commission/presscorner/detail/en/memo_19_527.
[23] Case C-181/23 (European Commission v Republic of Malta).

distinction between a digital nomad and a 'mere nomad' is that the former's work is not location-dependent, whereas the work of the latter presupposes highly extensive travel. However, the extent to which any form of work is location-dependent does not necessarily influence the question of personal attachment between the person and the state, which is the basic consideration under the residence principle. It should also be noted that whether any form of work is location-dependent does not only depend on the nature of the tasks involved in that work, but also on legal and regulatory requirements that may affect the portability of labour.

The topic of digital nomadism is interesting, because it illustrates the most extreme degree of mobility, in regard to the movement of both persons and their underlying income-generating activities. However, it should be considered that, beyond the theoretical allure of digital nomadism as a subject, this is a small, if not fringe group of taxpayers. For this reason, the implications of digital nomadism should arguably not be overstated. To begin with, digital nomadism is effectively unfeasible for employees, for contractual reasons. In practice, employment contracts often prescribe limiting conditions under which an employee may work remotely, especially from the territory of a country other than the one where the employer is a resident or has a permanent establishment, particularly in the case of higher-ranking employees. This is primarily due to the tax and social security implications that remote working entails for employers. Additionally, labour law and labour protection considerations also play an important role in limiting the extent to which employers tolerate open-ended remote working arrangements. In this respect, the consequences of digital nomadism for employment are limited in practice. Instead, digital nomadism may be more feasible for certain entrepreneurs, depending on the nature of their work.

Still, situations where nomads or digital nomads are not a resident of any state can be rare. Residence may be circumvented with relative ease in the host countries that the nomad visits. For example, residence tests that emphasize extended physical presence (e.g. Spain, 183 days) may be avoided by limiting the duration of the stay in the host country below that threshold. More substantive residence tests, which emphasize the broader facts and circumstances of the taxpayer, will normally not capture nomads that do not establish relevant or lasting connections to the host country. Conversely, it is more difficult for most (digital) nomads to break all relevant connections with the country of emigration, which in many cases also coincides with the country of nationality of the person. As previously mentioned, many countries define residence broadly, based on considerations that often ultimately allude to an intention to stay or return in that country indefinitely (particularly in countries that apply a concept of domicile for tax purposes). For practical reasons, these connections are often particularly difficult, as well as undesirable to remove entirely. This aspect is further compounded by the reality that digital nomadism is often a temporary, rather than a long-term or permanent lifestyle.

'Residence shopping', or optimizing the choice for jurisdiction of residence, is more attractive than attempting to circumvent resident status in any state. Where a mobile individual earns foreign-source income, the interaction of applicable tax systems can lead to excessively low or no taxation. For remote workers, as their work has no consistent tie to one location, it is possible for such an individual to, for example, establish residence in a tax-favourable country – especially one with a low threshold for residency - and to travel the rest of the time, staying less than 90 days in each country, on a tourist visa. In this case, they will only be taxed in their country of residence. When it comes to mobile individuals who earn passively from foreign sources, tax treaty allocation rules relating to this investment income generally favour the allocation of taxation to the residence state. It is possible that there is a jurisdictional mismatch where neither the source nor residence state tax the relevant income, or tax it very little. Thus, the state of residence is very important in individual tax planning.

It is possible for states to exploit this in order to boost their own tax bases (potentially at the expense of other states'). Low or no taxation may be due to low statutory tax rates, taxation on a purely territorial basis, or by preferential income tax regimes for foreign taxpayers. Such preferential regimes are arguably the most appealing method to attract individuals: they leverage increasing mobility via the establishment of tax concessions aimed only at certain foreign individuals, allowing states to protect their domestic tax base while attracting the desired group. Preferential regimes typically apply to incoming residents who have not resided in the country for a certain period or even exclude returning residents.[24] In this way, they ring-fence the income of their beneficiaries in order to create a favourable tax environment for them while avoiding the erosion of the domestic tax base. This favourable tax treatment may lead to the base erosion of countries of emigration and could ultimately result in the shifting of income to favourable jurisdictions.

However, not all preferential regimes are equally harmful. Preferential regimes may be categorized broadly as those targeting skilled workers, those targeting wealthy investors, and those targeting pensioners. When it comes to skilled workers, preferential regimes can be further categorized as those which treat foreign employment income favourably (referred to in the document as 'digital nomad regimes') and those which treat domestic employment income favourably (referred to in the document as 'expat regimes'). Preferential regimes targeting wealthy individuals or pensioners generally treat foreign passive income, i.e., investment and pension income respectively, favourably.[25] These different categories have different goals and different levels of potential harmfulness. Preferential regimes that target domestic employment income, and particularly those that have some kind of skills requirement, are arguably less problematic, as they reveal a policy goal to fill a gap in the labour market, and cannot result in double non-taxation. However, preferential regimes which exempt foreign source income - particularly from passive sources - regardless of its taxation at source may lead to under-taxation or non-taxation of the income.[26] For such regimes, there is a clear link between their policy goal and negative externalities created for other countries in the form of lost tax revenue, skills, and capital.

It is worth noting that non-tax policies interact with favourable taxation to enhance the attractiveness of the latter. Residence- and citizenship-by-investment schemes, to the extent that they coincide with low taxation, allow individuals to obtain low or no taxation in exchange for investment. Additionally, 'digital nomad visas' often come with exemptions on foreign-source income. Even if a visa scheme does not come with tax benefits attached, it is possible that an individual may benefit from a preferential regime if the visa allows them to establish tax residency. Indeed, some countries have digital nomad visas which neatly coincide with such regimes. For example, Georgia offers a visa waiver for remote workers who are citizens of a selected 95 countries, whereby after 183 days, they can become a tax resident and benefit from the 'individual entrepreneur scheme' by which they will only pay 1% income tax if earnings do not exceed EUR 170 000.[27] Of course, in general, digital

[24] Rita Szudoczky and Camilo Rodríguez Peña, 'Preferential Personal Income Tax Regimes (PPITRs) in the European Union: A New Form of Permitted (Harmful) Tax Competition?' (2024) 16 (2) World Tax Journal 246 267.

[25] Sarah Godar, Eloi Flamant and Gaspard Richard, New Forms of Tax Competition in the European Union An Empirical Investigation (Report No. 3, EU Tax Observatory 2021)11; Rita Szudoczky and Camilo Rodríguez Peña, 'Preferential Personal Income Tax Regimes (PPITRs) in the European Union: A New Form of Permitted (Harmful) Tax Competition?' (2024) 16 (2) World Tax Journal 8.

[26] Sarah Godar, Eloi Flamant and Gaspard Richard, *New Forms of Tax Competition in the European Union: An Empirical Investigation* (Report No. 3, EU Tax Observatory 2021) 14-15.

[27] IOM, *Overview: Digital Nomad Policies in the European Context* (Talent Hub: Supporting Copenhagen Capacity to strengthen retention and EU-mobility of skilled migrants through collaborative multi-country coordination on talent retention and circulation in the EU, 2024) 7-14.

nomad visas and related tax benefits are limited in duration, but they facilitate tax competition among countries wanting to attract remote workers, leading to a potential race-to-the-bottom.[28]

4. Non-competition agreements

In the context of global mobility, whilst the treaty allocation and characterisation of income derived as a consequence of non-competition agreements remains unsettled, studies show that "non-compete clauses are more prevalent than anticipated, with up to one-quarter of employees subject to such clauses in some countries."[29] Evidence from other OECD countries indicates that non-compete provisions are also used in a number of labour markets.[30] As non-compete provisions are typically incorporated into standard employment contracts, their relevance extends beyond traditional onsite employment to international secondments and remote working arrangements. From this perspective, as article 15(2) suggest physical presence, the nexus rule may not suit modern mobility, remote work, or short-term assignments.)

Also referred to as covenants not to compete, restrictive covenants, or post-employment restraints, among other terms, non-competition agreements embody a commitment by either an enterprise, an employee or former employee or even service providers not to engage in competition with another enterprise, with the employer or former employer, as the case may be. Whilst such clauses or agreements are typical for employees with management, direction and even professional, technical or commercial employment positions or services, studies demonstrate that these clauses/agreements extend beyond highly paid professionals to include low-wage and elementary workers.[31]

The features of non-competition agreements may be challenging. Limitations to the non-compete obligations are either determined by law or by the contract. In employment-related cases, non-compete clauses or agreements are increasingly subject to stricter limitations, both in terms of duration and geographical scope, often confined to a specific country or region. Due to abuses in the use of the clause, countries are restricting the scope and enduring the conditions under which non-competition can be agreed in employment contracts.[32]

Case law also provides numerous examples in which non-compete clauses have been declared void for various reasons, including inadequate or non-existent remuneration,[33] or the absence of any legitimate justification – namely, a genuine business interest – for requiring such an agreement, also questioning whether it is genuinely compensation for a restriction. In addition, courts frequently assess whether the clause is proportionate, taking into account its duration, geographic and material scope, and will invalidate non-compete obligations that unduly restrict the employee's professional

---

[28] Leonardo Thomaz Pignatar, 'The Taxation of 'Digital Nomads' and the '3 W's': Between Tax Challenges and Heavenly Beaches' (2023) 51 (5) Intertax 384, 390.

[29] Dan Andrews and Andrea Garnero, Five facts on non-compete and related clauses in OECD countries, OECD Economics Department Working Papers, No. 1833, (2025) OECD Publishing, Paris. For example, notwithstanding statutory bans or limitations in several U.S. jurisdictions (Washington D.C., Oregon, Nevada, Illinois)[29], non-compete clauses remain widely used across the US economy, affecting an estimated one in five American workers, approximately 30 million individuals. See Mikkel Hermansen, "Anti-competitive and regulatory barriers in the United States labour market", OECD Economics Department Working Papers, No. 1627, . (2020) OECD Publishing, Paris and Federal Trade Commission, 16 CFR Parts 910 and 912, Non-Compete Clause Rule, Final Rule, (2024).

[30] Dan Andrews and Andrea Garnero, 2025, op cit.

[31] Ibid.

[32] Countries enacting new regulations and imposing new requirements for the clause/contract to be valid include Denmark (2016), Finland (2022), the USA (2024), The Netherlands (2024).

[33] Compensation is not always agreed. As to Andrews and Garnero, no compensation is generally made "among low skilled workers or employees with no particular access to trade secrets and even in cases when they would not stand in court but still be useful to "scare" the worker." Ibid.

freedom beyond what is necessary to protect the employer's interests – as in many cases the [ex]employee has to bear unfair consequences.

The Commentaries to both the OECD and UN Model Tax Conventions refer to income arising from restrictive covenants in the context of employment income. Whilst the commentaries provide some guidance,[34] their practical effect remains limited given the breadth and complexity of the issues that may arise. These issues include the excessive reliance on domestic characterisation, divergences in income characterisation across jurisdictions -the distinction between income paid for the performance of activities within an employment relationship and forbearance payments or income arising from omissions—refraining from competing with an employer or former employer—, uncertainties in determining the source of income and the calculation of the amount due and allocated to each country if required.

Forbearance payments may be linked to an existing employment relationship or limited to the period following its termination. Increasing restrictions and bans to non-compete clauses may have an impact on the understanding of such payments. Compensation for non-competes upon the employment termination may or not be considered salary.[35] The treaty characterisation may be challenging, increasing litigation. In a case decided by the Spanish National Court "Audiencia Nacional", the Court concluded that income from non-competition agreement constitutes employment income generated in Spain and is not part of the so-called "other income" under the DTC between Spain and Uruguay.[36] The domestic characterisation of the payment under article 21.2 of the Workers' Statute settled the characterisation as employment income for DTC purposes. Furthermore, the termination of the employment relationship at the time of payment does not change their nature in the Court's view, since they originate from the previous employment relationship.

The domestic characterisation of the payment may not always help, however. Remunerated non-compete obligations may trigger issues of characterisation under domestic law. The judgment of the Canadian Federal Court of Appeals in Manrell v. Canada exemplifies the difficulties to establish the grounds upon which the non-competition agreements could be taxed. As to the Court: "the litigation history demonstrates that the potential solution to the problem of whether and how to tax non-competition payments ranges from full taxation as income, to partial taxation as capital gains, to no

[34] As to the OECD Commentaries, payments for non-competition obligations in connection to a present or past agreement are generally treated as employment income, but how they are taxed depends on their substance—they are not always treated the same way. The tax treatment depends on whether the payment is genuinely for the post-employment restriction or is effectively deferred pay for work already performed. A separate payment after termination for agreeing not to compete is usually employment income, but not remuneration for past work. Therefore, it is normally taxable only in the employee's State of residence at the time of payment. However, If the payment is in substance remuneration for work performed during employment (*e.g.* with little real value of the non-compete obligation), it should be taxed like normal employment income related to that past work, potentially allocating taxing rights to the work State. If the non-compete is already built into the salary during employment (no separate post-termination payment), then that portion of salary is treated like regular employment income, following the normal employment-income rules.

[35] Such payments may be excluded from domestic benefits if not listed explicitly in the tax provision, as in the case of a 30% reduction of the Spanish Personal Income Tax (article 12.1) for income from work obtained in a manifestly irregular manner over time. Exclusion confirmed by the Spanish General Sub-Directorate of Personal Income Tax, Binding Ruling V2736-19, of October 8, 2019.

[36] Therefore, in the Court view the withholding applied in the source country was correct. The appellant provided senior management services to a Spanish company whose contract was terminated by mutual agreement. The employment contract included a two years non-competition clause with a compensation equivalent to double 75% of the remuneration received in the last year of the contract, to be paid in 8 equal instalments at the end of each quarter. The paying company withheld taxes on the amounts paid as employment income. When the claimant moved his residence to Uruguay, it applied the withholding rate applicable to non-residents. The appellant requested a refund of the withholdings, arguing that the payments for the non-competition clause fall under the so-called "other income" DTC article, not under the employment income article. Spanish National Court (*Audiencia Nacional), judgment of 23 May 2022, Rec. 901/2019.*

taxation at all".[37] The judgement concluded that for the specific case at hand the payments for a non-competition agreement (given in connection with share sales) did *not* qualify as proceeds from the disposition of "property" and thus were non-taxable capital receipts under Canadian law. underscoring that the debate is a matter of tax policy, for which the only proper forum is Parliament.[38]

With potential domestic divergent classification and litigation on different tax treaty characterisations, clarification in the model convention (not only the Commentaries) may be welcomed. The Italian DTCs with the USA (1999) [39] and Qatar (2002)[40] opened the door for that alternative. Whilst dealing with severance payments (indemnities), these treaties define 'severance payments (indemnities)' for the purposes of the employment income article, stating that it includes any payment made in consequence of the termination of any office or employment of a person. Such provision makes clearer that forbearance payments in connection to employment and upon termination of the labour agreement fall under the scope of Article 15. An even clearer provision may be useful conditioned to the facts and circumstances of the case.

If non-competes can be assimilated to severance payments under tax treaties, recent tax developments may also have an impact in the application of current rules. For instance, in recognition of different treaty partner's interpretations of the OECD Commentary on the twelve-month guideline as the main rule and interpret severance payments, the Dutch State Secretary for Finance released the Decree 2022-19850[41] providing further explanation of the OECD Commentary regarding the taxation of severance payments in cross-border situations. According to this interpretation the severance payment must be allocated according to the length of service on which the amount of the severance pay is based. Following the Decree 2023-24998 of 15 December 2023[42], severance payment will be allocated based on the current calendar year and the four preceding calendar years for DTCs signed before 15 July 2014 whilst the allocation will be based on the total employment history of the employee for tax treaties signed after 15 July 2014. While the Dutch approach has a significant impact on the allocation of severance payments -warranting separate review in cases of high mobility- if non-compete payments are treated as equivalent to severance, as in the Italian treaties referenced above, the resulting implications should also be assessed, and any necessary clarifications obtained.

The 2021 judgement of the Liege Court of Appeals in application of the DTC between Belgium and France also help to exemplify the issues. Whilst assessing the taxation of the non-competition indemnity arising from an agreement concluded shortly after the termination of the employment

---

[37] Canadian Federal Court of Appeals, Manrell v. Canada, 2003 DTC 5225, 2003 FCA 128, (2003) available at [Manrell v. Canada, 2003 DTC 5225, 2003 FCA 128 | Tax Interpretations]

[38] "[66] According to counsel for Mr. Manrell, the Crown in this case originally proposed four alternative grounds upon which the non-competition payments could be taxed. One was the capital gains argument, the subject of this decision. The second was that the payment was income. The third was that section 42 applied. The fourth was that the payment was the proceeds of disposition of listed personal property (that argument was not raised in 'Fortino', and in this case it was abandoned prior to the proceedings in the Tax Court)". Ibid.

[39] In force since December 16, 2009, Article 18(3) of the DTC states: "Notwithstanding the provisions of paragraph 1, if a resident of a Contracting State becomes a resident of the other Contracting State, lump-sum payments or severance payments (indemnities) received after such change of residence that are paid with respect to employment exercised in the first-mentioned State while a resident thereof, shall be taxable only in that first-mentioned State. For purposes of this paragraph, the term 'severance payments (indemnities)' includes any payment made in consequence of the termination of any office or employment of a person."

[40] In force since March 25, 2009), Article 18(2) establishes "If a resident of a Contracting State becomes a resident of the other Contracting State, payments received by such resident on the cessation of his employment in the first-mentioned State as severance payments (indemnities) or similar lump sum payments, are taxed in that Contracting State. In this paragraph, the expression 'severance payments (indemnities)' includes any payment made in consequence of the termination of any office or employment of a person."

[41] *Directoraat-generaal Belastingdienst/Corporate Dienst Vaktechniek / Directoraat-generaal Fiscale Zaken, Verbruiksbelastingen, Douane en Internationale Aangelegenheden, Besluit van 25 januari 2022, nr. 2022-19850,* available at *[Staatscourant 2022, 3327 | Overheid.nl > Officiële bekendmakingen]*.

[42] *Directoraat-generaal Belastingdienst/Corporate Dienst Vaktechniek, Besluit van 15 december 2023, nr. 2023-24998,* available at *[stcrt-2023-31183.pdf]*.

contract, the Court concluded that for the tax year at issue, the non-competition indemnity had no connection with France. In the Court's view, as the agreement was concluded and performed in Belgium, the appellant was a Belgian resident at the relevant time, and the last ordinary remuneration prior to the contract termination was also Belgian-sourced. The Court therefore ruled that the treaty, and specifically Article 11 on income from employment, was irrelevant for assessing the taxation of the indemnity. Instead, the indemnity was characterized as taxable professional income under Belgian domestic law (Article 31 CIR 92), rather than as exempt or as miscellaneous income.[43] The source issue is not new.[44] From this perspective, potential issues for highly mobile activities relate to remote work. This is because remote further weakens physical presence as a sourcing factor, potentially allowing non-taxation if no clear source is identified.

Specific proposals to improve the commentaries exist already for some time[45], some introduced in the 2014 version of the Commentaries. Most recently developing countries approach to the subject in the UN Model challenge the OECD Model allocation rules and introduce anti-abuse approaches. As observers, India and the People's Republic of China do not adhere to the interpretation set out in paragraph 2.9 of Article 15 of the OECD Model. They take the view that "the payment that an employee receives in consideration for an obligation not to work for a competitor of his ex-employer constitutes remuneration derived from employment activities performed before the termination of the employment, and that such payment may be taxed in the Contracting State where the employment activities are performed before such termination".

Last but not least, non-compete payments may also arise in connection with service agreements and business-to-business non-competition arrangements. In cross-border transactions, these clauses are frequently encountered within franchise agreements, exclusive service or distribution arrangements, other exclusivity contracts, and intra-group dealings, whether during the contractual relationship or after its termination.[46] The fact that the work is performed remotely or by a highly mobile individual is not, in itself, decisive, as non-compete clauses are typically embedded in the contract governing the relationship between the parties. Nevertheless, high mobility tends to exacerbate the practical and legal issues associated with such clauses, particularly in cross-border contexts, where questions of applicable law, territorial scope, enforceability, and the allocation of taxing rights may become more complex.

---

[43] Liege Court of Appeals, Judgement of 6 September 2021, Docket No. 2017/RG/772.

[44] Already in 1943 the United States Tax Court held that income from a covenant not to compete is sourced to the place where the covenant restricts competition. Whilst this decision relates to a cross border transaction as no treaty was involved, it shows positions concerning the source of the income. Source and characterisation issues are to be highlighted in this case. As to the Court: "…the rights of Stoessel and Zorn to do business in this country, in competition with the petitioner, were interests in property in this country. They might have received amounts here for services or information, but were willing to forego that right and possibility for a limited period for a consideration. What they received was in lieu of what they might have received. The situs of the right was in the United States, not elsewhere, and the income that flowed from the privileges was necessarily earned and produced here. Petitioner is merely using it, so to speak, for a specified time, subject to periodical payments to the owners of the rights. Upon the termination of the contracts the rights reverted to Zorn and Stoessel, and they were then free to exercise them independent of the agreements entered into with petitioner. These rights were property of value and the income in question was derived from the use thereof in the United States…. We find and hold that the source of all of the income in question was in the United States and is subject to withholding tax in the taxable year." United States Tax Court, Judgement of 27 May 1943, Korfund Co. V. Commissioner Of Internal Revenue, available at KORFUND CO. v. COMMISSIONER OF INTERNAL REVENUE | 1 T.C. 1180 | T.C. | Judgment | Law | CaseMine

[45] Ibid. Potgens, 2009, op cit.

[46] As for instance in the OPEL cases decided by the Spanish Supreme Court in application of the DTC Spain-Germany,for instance TS: *judgment of 8-04-2000, cassation number. 4648/1995*, RJ 2000\3773, Adam Opel AG Vs General Administration of the State (*Administración General del Estado*). An analysis of this case and of various decisions and approaches to forbearance payments is presented by Buitrago (2005), *El concepto de canones y/o regalías en los Convenios para evitar la doble imposición*, CISS Kluwer, 2007, p.80.

In non-competition agreements related to services, intragroup dealings, etc, it may be improper to treat the income as employment income opening the question for the characterisation under Article 12, 13, 21 or 7. Scholars suggest that omissions connected to independent activities fall under Article 7 as such income is subordinated to a current, former or future business activity. From this perspective, the same idea would apply to independent activities covered by Article 8 or 17.[47] A clarification in this respect would be welcomed.

Treaty practice in regard to business to business payments for non-competition agreements shows surprising approaches that are worth clarification via the commentaries. Same as the OECD and UN Models, the U.S. Model Technical Explanation lacks a dedicated section on non-competition payments as a category of remuneration. Guidance related only establish the characterisation not applicable, excluding capital gains and royalties in some cases. In application of the DTC between the USA and Switzerland, the IRS hold that the payment made under a non-compete agreement is a fixed and determinable annual or periodical payment not covered by the 1951 Income tax treaty between the USA and Switzerland. In the IRS view the income is neither industrial or commercial profit (article III DTC), nor a royalty (article VIII) As a consequence the income is taxable in the USA, subject to a 30% withholding tax.[48]

Although this subject was discussed some time ago by the OECD,[49] neither the Model, nor the commentaries include explicit guidance on this respect. Whilst it have been suggested that the royalty provision is the one ruling this matter when the agreement involve cases in which the enterprise or employee have either valuable or sensitive information, knowledge, secrets, trade secrets or know how of the enterprise, of its industrial, commercial or scientific activities, processes, technologies, etc. the characterisation as royalties may not be adequate. Whilst information related to industrial, commercial or scientific experience, knowledge-know how or even show how, may have in itself an independent economic value leading to the forbearance payment, this is a payment made in exchange for a party's agreement to refrain from exercising a right or from engaging in a particular activity and as such not for the use or the right to use any of the goods, rights or property under the definition of royalties of the Model Tax Convention.[50] The OECD views on this field and potential characterisation would also be welcomed.

Dr. Esperanza Buitrago, Assistant Professor of International Tax Law
Dr. Alice Draghici, Assistant Professor of International Tax Law
Prof. dr. Kasper Dziurdź, Professor of International Tax Law
Nicole Gibbs, PhD Candidate
Narin Kerinc, PhD Candidate
Dr. Sander Kramer, Assistant Professor of Tax Law
Prof. dr. Marjon Weerepas, Professor of Fiscal Aspects of Cross-Border Work

---

[47] Ekkehart Reimar, 2006, op cit.
[48] IRS, National Office Technical Advice Memorandum, Index (UIL) No.: 1441.02-01, 1441.07-00, 1442.00-00 TAM-107546-99, (1999) available at 9947031.pdf.
[49] OECD Working Party 1, *Issues currently under discussion in the Working Party and the Steering Group,* (1999).
[50] Buitrago, 2005, op cit., p. 78ff.