What's in store for teleworking?

Whereas many companies were reluctant to allow their employees to telework, the health crisis precipitated its deployment. It must be said that the Covid-19 crisis forced Luxembourg and its neighbours to review their tax and social security rules on homeworking, which facilitated its introduction but also its extension until the end of 2020.

During this same period, an amicable agreement was signed by and between France and Luxembourg setting out the terms of application for the tolerance threshold in terms of taxation, which has a direct impact on the possibilities of teleworking for French residents.

Generalised teleworking cannot be maintained, of course, but pressure is growing on the public authorities to relax the tax rules which are holding back the development of teleworking so that teleworking can be offered more widely to employees.

I. Current derogative agreements

Many companies continue to use telework at this time based on the employer's legal obligation to **ensure the health and safety of employees at work** (Article L. 312-1 of the Labour Code).

As you know, for cross-border commuters, telework is likely to have certain effects in terms of their social security affiliation as well as their taxation.

A. In terms of social security

Regulation (EC) no. 883/2004 on the coordination of social security systems lays down a general principle to the effect that **an employee may be affiliated only in one state.**

The important criterion in this case is the employee's substantial activity in his country of residence. Where an employee works **25% of his working time** and/or receives **25% of his remuneration** in his country of residence, all remuneration received in the different countries is subject to one single social security scheme, that of his country of residence.

Consequently, teleworking days are added to this 25%, thereby limiting the possibilities for cross-border commuters to telework if they want to remain affiliated to the Luxembourg social security system. In view of the considerable impact of a change in social security for both the employee and the employer, the interest of not exceeding this 25% threshold is easy to understand.

- Because of the Covid-19 pandemic, the Belgian, German and French authorities decided in mid-March that periods of teleworking performed on their territories by their frontier residents due to the coronavirus **will not be taken into account for determining the applicable social security legislation.** This measure is to remain applicable **until 31 December 2020.**

B. In terms of taxation

The basic rule is that frontier workers are taxable on their salary in Luxembourg provided that they carry out their activity physically on Luxembourg territory. It is therefore not enough for them to work for a Luxembourgish employer. They must also **travel physically to Luxembourg** to carry out their activity there. Where the professional activity is carried out outside Luxembourg, the country of residence of the cross-border commuter receives the right to tax his or her professional income for the days worked in that country.

In other words, frontier workers are in principle taxable in their country of residence for the days they telework from home.

In order to temper the consequences of this rule, Luxembourg and neighbouring countries have determined annual **tolerance thresholds** by consensus. These enable the Grand Duchy to preserve its full right of taxation if a non-resident employee works outside Luxembourg for a period not exceeding in total the quotas listed below:

- **29-day** threshold for **French** residents
- **19-day** threshold for **German** residents
- **24-day** threshold for **Belgian** residents

Accordingly, as soon as these limits are exceeded, the frontier worker will be taxed in his country of residence for all days of telework from home.

It is therefore crucial to inform employees of the consequences of exceeding these thresholds. As an employer, you are required to keep a register of days spent outside Luxembourg (teleworking or elsewhere).

- In view of the COVID-19 **health crisis,** agreements have been signed with neighbouring countries.
  For **Belgian and French tax residents**: it was decided that as of Saturday, 14 March 2020, the presence of a worker at home, in particular for teleworking purposes, will not be taken into

account for the tolerance thresholds set out above. This measure shall apply until 31 December 2020.

For **German tax residents**: as of Wednesday, 11 March 2020, the days of teleworking by these cross-border workers **do not have to be taken into account for the 19-day tolerance threshold.** This agreement is automatically extended from month to month until it is denounced by one of the 2 countries.

	Germany	Belgium	France
Tolerance threshold	19 days per year	24 days per year	29 days per year
Start of derogative agreements	As of 11 March 2020	As of 14 March 2020	As of 14 March 2020
End of derogative agreements	Automatic extension from month to month until terminated by one of the countries	31 December 2020	31 December 2020

II. What are the terms of application of the tolerance threshold for French residents?

Whereas the tax treaties between Luxembourg and Belgium as well as between Luxembourg and Germany were sufficiently clear, because they were older and more detailed, many questions remained regarding the tax treaty with France. An amicable agreement, signed on 16 July 2009, clarified the terms and conditions for the application of the tolerance threshold of this treaty.

A. Tolerance threshold tally

By way of reminder, French residents who are employed in Luxembourg remain fully liable to Luxembourg tax when they work for a maximum of 29 days per year in their state of residence and/or in a third state.

The days when the employee is **physically** present in his State of residence and/or in a third State to work are taken into account in this tolerance threshold.

Any fraction of a day shall count as a full day, so that days when the employee is employed only partially in his state of residence and/or in a third state shall be taken fully into account for the calculation of the 29 days. **Any fraction of a day will therefore count as a full day.**

In particular, any day or fraction of a day during which the employee is present in his state of residence and/or in a third state in order to undergo vocational training shall also be taken into account for the calculation of the tolerance threshold.

B. What about part-time employees?

In the case of part-time work and/or an activity carried out during only part of the year, the **29-day threshold is reduced proportionally according to the working time** stipulated in the employment contract and/or the term of the contract. When this proportion does not correspond to a number of full days, the lower number of full days must be used. Example: For a French resident employee with a part-time employment contract, the tolerance threshold will be set at 14 days.

Furthermore, the maximum threshold of 29 days must be assessed on an annual and global basis, including in the case of activity carried out during the same year under several separate employment contracts.

C. Days to be excluded

The following days are not taken into account in calculating the 29 days:

- Days off;
- Weekly rest days;
- Public holidays;
- Days of incapacity;
- Cases of force majeure beyond the employer's or employee's control. It should be noted that the **COVID-19 epidemic** is considered as a case of force majeure for the period from 14 March to 31 December 2020.

III. What does the future hold in store for teleworking?

Many of you set up telework these last months and this remains topical for many of you for that matter. During the lockdown, telework was initially presented as a solution to keep part of the economy going. In the end, it turned out to be a good experience for the majority of employees and employers and the latter would even be willing to continue the adventure.

Many employers have actually seen the productivity of their employees go up. The cliché that employees work less when they are teleworking has therefore been debunked! As a result, employers have gained greater confidence in their employees.

Generalized teleworking cannot be maintained indefinitely, of course, but pressure is growing on public authorities to relax the tax rules that hinder the development of teleworking so that it can be offered more widely to employees afterwards.

A petition has to that end been filed to recognize the employee's "right to telework". After collecting 5,933 signatures (only 4,500 were needed), the issue will have to be debated in the Chamber of Deputies in the coming months. The Ministry of Finance has also indicated that telework was "one of the priorities" of the executive. Extending telework for cross-border commuters is nonetheless still the subject of negotiations with neighboring capitals, since no tax changes can be made without the approval of Berlin, Brussels and Paris.

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