

BRIEFING JULY 2023

HOME OFFICE: NEW TAX AND SOCIAL SECURITY SITUATION AS OF 1 JULY 2023

Home office (often also referred to as teleworking) has quickly become an indispensable part of the working world. In international relations, home office can have an impact on tax law and social security subordination. In this context, several developments have already entered into force in recent months.

- In relation to Germany: home office days are not regarded as non-return days for frontier workers.
- In relation to France: cross-border home office is allowed for up to 40% of working time.
- Italy: developments here have already partly been discussed in separate Bär & Karrer briefings, to which reference is made.¹ The explanations in this regard in the present briefing are therefore rather limited.

- Social security law subordination in relation to the EU/EFTA: Employees who, in principle, work in their employer's country of residence can work from home on a cross-border basis for up to 50% of working time, without losing the subordination to the social security system in the employer's state. This scheme will apply from 1 July 2023 in relation to neighbouring countries Germany, France, the Principality of Liechtenstein and Austria, but not yet in relation to Italy (where the 25% limit will again apply from 1 July 2023).

The tax regulations in force as of 1 July 2023 in relation to the most important neighbouring countries and the developments in the area of social security subordination rules in relation to the EU/EFTA are presented below. Some questions and challenges remain unresolved as of

July 1, 2023, and further changes and revisions are to be expected.²

In the case of cross-border employments, a detailed analysis of the tax and social security consequences on a case-by-case basis is essential for both employers and employees, in order to comply with the rules in force and prevent exposure to the risks of double taxation, double subordination or violation of legal and procedural obligations. In addition, issues of labour law, regulatory requirements and licensing law regularly arise, which should also be carefully analysed.

TAX REGULATIONS

PRINCIPLE

In the absence of any provisions to the contrary, according to the basic rule in double taxation agreements ("DTAs") concluded by Switzerland, the principle of the place of activity applies. Home office days may be taxed by the employee's country of residence, regardless of the employer's country of residence. If the employer is established in another state, that state may tax only those days of work which the employee physically works in that state.³

These principles are also implemented in the DTAs with the neighbouring countries Germany, France, the Principality of Liechtenstein, Austria and Italy. However, there are sometimes special arrangements for cross-border workers.

¹Briefing of February 2023 ([Briefing February 2023: Teleworking Italy](#)) and NEWSFLASH of May 2023 ([NEWSFLASH May 2023: Teleworking Italy](#)).

²This Briefing provides an overview of the most important regulations and developments. It should not be understood as being comprehensive.

³Different regulations apply, among other things, to boards of directors and some DTAs provide for special regulations for senior employees. These topics are not discussed further here.

GERMANY

In relation to Germany, there are special regulations for frontier workers.⁴ The country of residence of a frontier worker may tax his/her earned income even though the work is carried out in the state of residence of the employer. The employer's country of residence may levy a withholding tax of up to 4.5% of earned income as compensation, which must be taken into account by the country of residence of the employee for the purposes of taxing the frontier worker. As early as July 2022⁵, home office days for frontier workers were no longer considered as non-returning days. Working in the home office for an employer in the other contracting state does not therefore in principle lead to the loss of the frontier worker status. It should be noted that from the German point of view certain minimum commuting movements must be fulfilled.⁶

Unless a person qualifies as a frontier worker within the meaning of the DTA with Germany, the usual taxation rules generally apply (principle of place of activity, with special rules for senior employees).

FRANCE

An additional agreement signed on 27 June 2023⁷ confirms and strengthens the new arrangement with France, already concluded on 22 December 2022, according to which, even in the case of cross-border home office working time of up to 40%, earned income may be taxed in the employer's state of residence.⁸ The employer's state of residence, on the other hand, transfers to the employee's state of residence 40% of the tax levied on remuneration for work carried out in the

home office in the state of residence⁹ (thus not on the total remuneration).¹⁰ To ensure the application of the new rules, wage data will be exchanged automatically, which systematically constitutes a significant innovation on its own.

So, in relation to France, cross-border home office working time of up to 40% is possible without changing the tax rules for the employee and the employer. This applies both to persons who qualify as frontier workers within the meaning of one of the two frontier worker agreements¹¹ and to persons who do not qualify as a frontier worker.

Two memoranda of understanding on the practicalities of the rules on the exercise of home office, each together with a corresponding fact sheet with case studies, all dated 10 July 2023¹², clarify the extent to which business trips in the country of residence or in third countries qualify as part of the cross-border home office working time of up to 40% and thus have no influence on the taxation rules. A maximum of ten days per year are permitted for business trips within the allocation of time for the cross-border home office. The consequences of exceeding the 10-day rule are relatively complex and depend on whether the employee concerned is a frontier worker within the meaning of the frontier worker agreement.

PRINCIPALITY OF LIECHTENSTEIN

Switzerland has a frontier worker agreement with the Principality of Liechtenstein¹³, according to which the earned income of frontier workers may only be taxed in

⁴A frontier worker in relation to Germany is a person who has his/her place of work in the other contracting state and regularly returns to his/her place of residence after the end of the work. If, after the end of work, the person does not return daily to their place of residence, frontier worker status ceases if, in the case of 100% employment, there are more than 60 non-return days in any calendar year.

⁵Consultation agreement of 15/18 July 2022 on working days spent all day at the place of residence of frontier workers for the application of the frontier worker regime in Article 15a of the DTA.

⁶One day per week or five days per month, the employee must work at the employer's registered office and return home in the evening in order to be considered a frontier worker.

⁷See the press release of 27 June 2023, [press release Supplementary Agreement to the Swiss-FR DTA](#). The additional agreement still needs to be approved by the legislator in both countries. Until then, it will be applied temporarily until 31 December 2024 at the latest.

⁸One memorandum of understanding covered the DTA in general (Art. 17), while the other related specifically to the frontier worker agreement between France and the cantons of BE, SO, BS, BL, VD, VS, NE and JU. The rules on home office were identical (up to 40% of working time).

⁹If the employer is in the canton of Geneva, this compensation is only due for that portion of work in the home office that is between 15% and 40% of the working time per year and thus not for home office work of less than 15%.

¹⁰This arrangement will only apply from 1 January of the year following the entry into force of the additional agreement. Until then, there is a transitional arrangement whereby Switzerland transfers 2.3% of the taxes paid to France on the earned income of workers resident in France.

¹¹Frontier worker agreements relating to the Canton of GE on the one hand and frontier worker agreements relating to the cantons of BE, SO, BS, BL, VD, VS, NE and JU, on the other hand. Both agreements also require a (almost) daily return to the place of residence. In case of more than 45 non-return days per year (full-time work), frontier worker status is lost.

¹²One memorandum of understanding concerns the DTA in general (Art. 17) and also applies in relation to Geneva; the other concerns specifically the frontier worker agreement between France and the cantons of BE, SO, BS, BL, VD, VS, NE and JU. The memoranda of understanding and fact sheets are available under [the double taxation agreements between Switzerland and France FTA \(admin.ch\)](#).

¹³The definition is essentially the same as in relation to France. A maximum of 45 non-return days per year are permitted.

their country of residence. There are currently no more specific rules governing cross-border home office.¹⁴ Home office days are therefore considered as non-return days and working from home is only possible to a limited extent without frontier workers endangering their respective status.

AUSTRIA

There are no specific rules with Austria on the taxation of frontier workers or on cross-border home office. The principle of place of activity therefore applies, whereby home office days may be taxed by the employee's country of residence.

ITALY

As stated in our briefing¹⁵, there will be a paradigm shift in the taxation of frontier workers from 1 January 2024. Under the current rules, the state where the activity takes place has an exclusive right to levy taxation. For Italian frontier workers¹⁶, this means that no tax is payable in Italy on their income from employment.¹⁷ Under the new system, which will enter into force on 1 January 2024, (new) frontier workers will become¹⁸ liable to tax both in the country of residence (100%) and in the country of employment (80%), with the country of residence avoiding double taxation by means of exemption (Switzerland) or credit (Italy).

There is, in principle, an obligation for both categories of frontier workers to cross the border on a daily basis. **Even working from home for only one day can therefore be harmful for qualifying as a frontier worker.**¹⁹ Special regulations were put in place during the Covid pandemic (until the end of January 2023) according to which home office days (without limitation) were considered days worked at the usual place of work. The scheme was then continued until 30 June 2023 (limited to 40% of the working days²⁰) and is currently no longer in force. The two countries are negotiating a durable solution and the

responsible Italian minister has repeatedly confirmed publicly that the exemption rule (limited to 40% of working days) is to continue until 31 December 2023 (with retroactive application from 1 July 2023), but there have not yet been any official steps (neither under the DTA nor unilaterally) in this direction.

NATIONAL DEVELOPMENTS

In order to exercise the right to tax home office days of employees living abroad effectively, a new basis of taxation must be created in Switzerland. Currently, individuals resident abroad are only subject to a limited tax liability based on their professional activity in Switzerland if the work is physically performed in Switzerland. In future, those employees resident abroad will also be subject to a limited tax liability in Switzerland even if their employment is physically carried out abroad for an employer with a registered office, place of effective management or a permanent establishment in Switzerland.²¹ The date of entry into force of this new regulation is still pending. Employers in Switzerland will have to take it into account in their payroll systems, including data collection.

RISK OF A PERMANENT ESTABLISHMENT

Under certain circumstances, the home office of an employee may establish a permanent establishment of the employer in the employee's country of residence, particularly for important employees such as senior employees or so-called. "C-level". Unlike other countries, Switzerland is currently still reluctant to qualify a home office as a permanent establishment, both nationally and internationally. In any case, the topic should be carefully analysed in connection with employees working cross-border in their home office and, if necessary, clarified with the relevant tax authorities.

¹⁴The understanding agreement in force during the Covid pandemic was terminated on 31 March 2022.

¹⁵Briefing of February 2023 ([Briefing February 2023: Teleworking Italy](#)) and NEWSFLASH of May 2023 ([NEWSFLASH May 2023: Teleworking Italy](#)).

¹⁶Under the current rules, (Italian) frontier workers are only employees who live within 20 km of the border with Switzerland, work for a Swiss employer in the cantons of Ticino, Graubünden or Valais and return home daily. Employers operating across borders who do not fulfil this definition are subject to the general rules of the DTA (competing tax jurisdiction of country of residence and country of activity).

¹⁷For their part, the Swiss border cantons must transfer 38.8% of the income from the taxation of frontier workers to Italy.

¹⁸The new agreement will only apply to frontier workers who start working in Switzerland from the date on which the

instruments of ratification are exchanged. So-called "old" frontier workers continue to benefit from and remain within the rules of current law.

¹⁹The tax consequences vary depending on whether "new" or "old" frontier workers are affected. In principle, the loss of qualification as a frontier worker in the case of Italian frontier workers leads to a (100%) competing tax claim by the two states (whereby for Switzerland this is limited to the actual days of presence in Switzerland).

²⁰However, this scheme was not published until 30 June 2023 with retroactive effect from 1 February 2023.

²¹On 9 June 2023, the Federal Council opened the consultation procedure on the Federal Act on the taxation of Mobile Employment in International Relations, which runs until 2 October 2023 – see the press release of 9 June 2023: [Initiation of consultation on taxation of home office abroad](#).

SOCIAL SECURITY REGULATIONS

PRINCIPLE

Within the framework of the social security coordination rules between Switzerland and the EU/EFTA States²², the so-called “place of employment principle” applies, according to which a person is subject to the social security provisions of the state in which he/she carries out his/her work. However, the question of subordination for social security purposes is complex, in particular if an individual works for several employers in different states or simultaneously pursues a self-employed and an employed activity.²³

NEW MULTILATERAL AGREEMENT ON HOME OFFICE

The flexible application of the subordination rules that applied in connection with the Covid pandemic until 30 June 2023 was replaced by a multilateral agreement signed by Switzerland in May 2023²⁴, which aims permanently to take account of the increasing spread of work in home office in the area of social security law. It should be possible for an individual to remain subject to the social security system of the employer’s country of residence, even if a significant portion of their work is carried out in a cross-border home office. If previously an activity of at least 25% in the country of residence of the employee was sufficient for him/her to be subordinated to the social security system in his country of residence, employees who usually work in the employer’s country of residence may now work **up to 49.9% in cross-border home office** (measured in an overall context of the calendar year) without being subject to the social security system of their country of residence. Only if the work in the cross-border home office is 50% or more will subordination change to the social security system of the employee’s country of residence.

It should be noted that the new multilateral agreement will not automatically apply in relation to all EU/EFTA states, but **only if both concerned** states have signed the agreement. In addition to Switzerland, the following states have already signed the multilateral agreement and brought it into force as of 1 July 2023:²⁵ Germany, France, Liechtenstein, Croatia, Czech Republic, Austria, Netherlands, Slovakia, Belgium, Luxembourg, Finland, Malta, Norway, Poland, Portugal, Spain and Sweden. In the

longer term, it is planned to adapt the European coordination rules to take account of cross-border home office in general in relations between all member states.

Moreover, for the multilateral agreement to apply, it is of course always necessary that the agreement on the free movement of persons with the EU and EFTA is applicable for the employee in question. In addition, the new multilateral agreement does not apply to various situations, e.g., for employees who carry out activities other than working from home in their country of residence (e.g., visits to customers, self-employed secondary employment) or who do not exclusively work in their country of residence and the employer’s country of residence. Special rules also apply to home office in the context of an assignment, which are not discussed herein.

As long as the new rules only apply in relation to the EU/EFTA States, which have also already enacted the multilateral agreements, the situation must be examined in detail for each employee working in a cross-border home office. In order for the rules to apply, **an application must be made in the employer state**. In Switzerland, this can be done via the ALPS information system. Once approved by the foreign social security institution in the employee’s country of residence, an A1 certificate is automatically issued, valid for three years. The A1 certificate shall, in principle, be valid from the date of application, but may be issued up to three months in arrears. Under a transitional arrangement, applications submitted by the end of June 2024 may also be issued retroactively with effect from 1 July 2023. It is therefore not necessary to submit the application immediately on 1 July 2023. Details on how to apply the new rules can be found in AHV Notice 470.²⁶ The new rules already apply in relation to the states that also entered into force on 1 July 2023. For the HR/payroll departments of employers, the new rules represent a challenge that should be proactively addressed.

For those states that have not signed the multilateral agreement (among Switzerland’s neighbouring countries, in particular Italy), the current regulations will continue to apply (25% working time restriction).

²²Regulations on the coordination of social security systems (Regulation (EC) No 883/2004 and 987/2009).

²³See the overview in the Guidelines on the obligation to take out insurance in OASI/IV (“WVP”), as at 1 January 2023.

²⁴See the SBA website: [impact of working from home on social insurance in an international context](#). The original text of the multilateral agreement (English) can also be found there.

²⁵Status as of 12 July 2023. Cf. Notices to the AHV compensation offices and EL Implementing agencies No 470 of 20 June 2023 (available under [AHV Communication 470](#)) with reference to the ongoing updated list of States Parties to the Belgian Social Security Authority (available at [cross-border teleworking in the EU, the EEA and Switzerland](#)).

²⁶Available at [AHV Notice 470](#).

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