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Commuters and remote working

The (in)adequacy of international tax treaties

The COVID-19 pandemic forced jurisdictions to address new circumstances as emergency legislation has been adopted. The labor market is moving from physical presence to an alternative way of work, such as remote working. The author addresses the issue from the fiscal perspective, analysing the arising need for rules able to address the phenomenon of cross-border commuters working from their residence State (or abroad). This article aims to stress the more critical points, evaluating if the basis set in mutual agreements signed by States, following the OECD's guidelines on interpretation and application of tax treaties, may represent a start or if a more profound change is deemed necessary.

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1. Introduction

[1] The COVID-19 pandemic found the international community unprepared. The health emergency soon resulted in a huge economic and social disease. States appealed to all their resources to face troubles and they are still planning the recovery through detailed schedules, which encompass tax measures.

[2] More than ever, revenues play a key role. Such circumstances exacerbate the willingness to tackle evasion and avoidance, which lead to a detriment of both taxpayers and the state. In a new scenario, where the main issue seems to be the harmful behavior of multinationals (MNEs), the international community seems to underestimate a parallel phenomenon concerning individuals. The OECD shed a light on corporate income tax through the Two-Pillars solutions,[1] leaving aside a huge phenomenon such as remote working.

[3] Indeed, conventional tax rules based on a strong nexus with physical presence revealed their inadequacy not only regarding companies, especially the bigger ones, but also to individuals.[2] The flow of the so-called High Net Worth Individuals (HNWI) is not the only hot topic of discus-

1 OECD/G20 Base Erosion and Profit Shifting Project, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From Digitalisation of the Economy, 1 July 2021, retrieved at https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf (last accessed on 29 March 2022). Under the OECD website focused on Action 1 of the Base Erosion and Profit Shifting (BEPS) Project, it is possible to find the exact timeline of progress occurred within this Two-Pillars approach, in: https://www.oecd.org/tax/beps/beps-actions/action1/ (last accessed on 29 March 2022).

2 Svetislav V. Kostić, In Search of the Digital Nomad – Rethinking the Taxation of Employment Income under Tax Treaties, in World Tax Journal, vol. 11, n. 2, 2019, p. 190–224; Young Ran (Christine) Kim, Taxing Teleworkers, 55 UC Davis L. Rev. 1149, 2021, University of Utah College of Law Research Paper No. 473, p. 1149–1226, retrieved at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3942995 (last accessed on 29 March 2022).

sion. From an economic perspective, also the mobility of workers represents an added value, a cornerstone of the global market.

[4] When COVID-19 hit the world, jurisdictions had to adopt emergency measures. The interconnection between countries was seriously endangered by the closing of the borders. The lockdown resulted in freedom constraints in private life, but also at work. Lots of activities were suspended. Others were simply moved from offices to homes. Most of the employees were forced to carry out their working activities virtually from home.

[5] Restrictions to the free movement of persons, especially in those cross-border circumstances, raised immediate worries for states where a relevant part of the workforce came from abroad.

[6] Frontier workers are the clearest example. Commuting, indeed, is a widespread *phenomenon* in several countries, even if often underestimated. For some of them, commuters represent a pillar in strategic sectors of the economy. Thus, jurisdictions involved had to deal with such an issue almost immediately, providing answers and temporary rules. As regards the freedom of movement, emergency measures provided some exceptions for commuters working in particular fields such as health care. Others would be allowed to work remotely. Such choices would have prevented a general stop of the economy.

[7] Only in a second phase, the awareness of the peculiarity of these circumstances resulted in tax doubts. An emergency that spread in a globalized world required harmonized measures among countries.

[8] The OECD intervened by publishing some brief notes as guidance in interpreting and applying tax treaties during the pandemic, which must be considered as *force majeure*.[3] Accordingly, jurisdictions signed bilateral mutual agreements to rule out questionable circumstances. Most of them addressed the tax regime applicable to cross-border workers: following the *rebus sic stantibus* principles, they agreed to apply the already existing provisions until the «*emergency status*» would end. Deadlines have been progressively extended until 31 March 2022.

[9] Anyway, the pandemic acted only as a «booster» in changing the labor market, which is moving from physical presence in offices to remote working. Home office will no longer represent the exception, but the norm.

[10] This increasing development requires an update in the international tax framework to grant certainty and the right assessments.[4] The new *scenario* overturned the international tax fundamentals. The historical concepts of state of residence and state of source were no longer enough to understand how to allocate taxing rights. Difficulties arose mainly concerning tax residence, permanent establishment, and cross-border workers. Taxation rules applied to cross-border workers are deeply affected by this change due to the nature of commuters, i.e. workers who work in a state, but return to their domicile daily or weekly. Does it still make sense to talk about cross-border workers, who opt for remote working?

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3 OECD, Secretariat analysis of tax treaties and the impact of the COVID-19 crisis, 2 April 2020, retrieved at https://www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/ (last accessed on 29 March 2022). For a critical view, see Andrés Báez Moreno, Unnecessary and Yet Harmful: Some critical remarks to the OECD Note on the Impact of the COVID-19 Crisis on Tax Treaties, in: Intertax, vol. 48, 8–9, 2020, p. 814–830.

4 Hannelore Niesten, Revising the Fiscal and Social Security Landscape of International Teleworkers in the Digital Age, in Intertax, vol. 49, 2, 2021, p. 142–144.

[11] Starting from the state of the art, this article aims to evaluate if the basis laid down in mutual agreements could represent a good start or if a deeper change is needed.

[12] A traditional legal method is applied to this study, resulting in a description, classification, and analysis of the legislative technicalities concerning the taxation of cross-border workers, putting the accent on the Swiss perspective. Guidance from the OECD and national tax administrations as well as the legal doctrine are taken into account.

[13] The study is delimited as follows. Initially, this paper does not provide a comprehensive analysis of cross-border working in general, but it focuses on employed commuters in the various stages of the pandemic. Moreover, the study is limited to tax considerations, leaving aside social security regulations.

2. Cross-border workers: from the definition to the conventional tax regime

2.1. Definition of frontier worker

[14] Frontier workers, cross-border workers, commuters: these are all synonyms to identify a particular category of workers.

[15] No provision gives a universal definition of a commuter for tax purposes, neither at the international level nor at the European one.[5]

[16] The concept is based on two main *criteria*: *(i)* the spatial one (usually, these workers live close to the border of two jurisdictions) and *(ii)* the temporal one (*i.e.* the daily/weekly return back home).

[17] Generally, a commuter is identified as a person whose normal employment activities are carried out in one country (usually, state of source), while (s)he is resident in another one (state of residence), where (s)he usually comes back after the workday/workweek.

[18] Double taxation issues may arise in respect of these workers partly as regards which of the two countries may tax the employment income and partly as regards the entitlement of the individual to personal reliefs and deductions in the country of employment.

[19] Thus, their tax regime is usually defined within bilateral tax treaties (hereinafter, DTA). It is worth noting that the OECD Model Convention on Income and Capitals (hereinafter, OECD MTC)[6] does not rule on commuters. Indeed, the Commentary on art. 15 OECD MTC provides that «*It should be noted that no special rules regarding the taxation of income of frontier workers [...]*

5 For the sake of completeness, Regulation (EC) No. 2004/883 on the coordination of social security systems defines frontier workers as «*any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he/she returns as a rule daily or, at least, once a week*». See European Trade Union Confederation, Guide for mobile European workers, 2017, available at https://www.etuc.org/sites/default/files/publication/files/mobility_guide_uk.pdf (last accessed on 29 March 2022). A cross-border worker is defined as «*an employee who works in one Member State (State of employment) and lives in another (State of residence). It is essential that he retains his normal place of residence outside the State of employment. If the cross-border employee moves to the State of employment, he becomes a migrant worker. A resident who moves to a neighboring State but continues to work in his original State of employment (migrant resident), is also a cross-border or a frontier worker. The term ‹normal› place of residence does not exclude the possibility that the cross-border employee, for practical reasons, also has temporary accommodation in the state of employment*».

6 OECD, Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing, Paris, 2017, https://doi.org/10.1787/mtc_cond-2017-en.

are included as it would be more suitable for the problems created by local conditions to be solved directly between States concerned».[7] It means that signatory countries should add a paragraph within DTAs' provisions or sign a specific separate agreement.

2.2. Conventional provisions on cross-border workers: article 15 OECD Model and the taxation of income from employment

[20] As mentioned, the OECD MTC does not provide any specific rule for commuters. Usually, states concerned add a fourth paragraph to art. 15, addressing the taxation of income from employment, in each signed DTA dealing with frontier workers. More than often, this is combined with a specific agreement on commuters.

[21] Otherwise, normal rules apply.[8]

[22] Under art. 15(1) OECD MTC, the employment income is taxed in the state of residence of the employee, unless the working activity is carried out in a different country. Under the Commentary, the employment is deemed to be «*exercised in the place where the employee is physically present when performing the activities for which the employment income is paid*».[9] This source state shall exercise its taxing right and the residence state has to avoid double taxation through the credit or the exemption method (art. 23 A and B OECD MTC).

[23] There is an exception to the above if the link between the employee and the state of source can be considered «weak». Where three cumulative conditions are fulfilled, the residence state is allowed to keep its exclusive right to tax the employment income. It means that the employee: *(i)* spends less than 183 days *per* year in the source state, *(ii)* does not receive her/his salary from an employer resident in the source state, *(iii)* nor from a permanent establishment therein.[10]

[24] In absence of a specific paragraph within art. 15 of a specific DTA, cross-border workers shall be taxed in the source state where the employment is exercised. Such fiscal treatment is often thought to be unfair because the employee benefits, to a large extent, from the provisions in her/his country of residence without paying any income tax to that country. Moreover, the tax regime of frontier workers may be less favorable than the tax treatment of residents in that country.[11]

[25] Despite there being no general rule on taxing powers' allocation in such circumstances, the analysis of enforced bilateral tax treaties shows the trend of granting exclusive taxing rights to

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7 OECD MTC Commentary, *ad* art. 15, para. 10, p. 323.

8 Niesten (note 4); See, Frank Pötgens, Income from International Private Employment: An Analysis of Article 15 of the OECD Model, 12 IBFD Doctoral Series 332, IBFD, 2006; Bernard Peeters, Article 15 of the OECD Model Convention on «Income from Employment» and its Undefined Terms, in European Taxation, Feb/Mar 2004, pp. 72–82; Michael Lang, Introduction to the Law of Double Taxation Conventions, 3rd ed., Linde, 2029, p. 81 ss.

9 OECD MTC Commentary, *ad* art. 15, para. 1, p. 305. *Ex multis*, Lang (note 8), p. 82 ss.

10 See, also, Luc De Broe et al., Interpretation of Article 15(2)(b) of the OECD Model Convention : «Remuneration Paid by, or on Behalf of, an Employer Who is not a Resident of the Other State», in: Bullettin – Tax Treaty Monitor, Oct. 2000, p. 503 ss.; Kasper Dziurdz/Frank Pötgens, OECD – Cross-Border Short-Term Employment, in: Bulletin for International Taxation, vol. 68, n. 8, 2014.

11 See also Francesca Amaddeo, Frontier Workers and Remote Working: A Swiss-Italian Tax Perspective, in: Kluwer International Tax Blog, retrieved at: http://kluwertaxblog.com/2022/01/28/frontier-workers-and-remote-working-a-swiss-italian-tax-perspective/ (last accessed on 29 March 2022).

the state of residence.[12] However, other treaties opt for a withholding tax on the income (salary, wages, and other similar incomes) in the source state. As to assure tax equity, this latter ought to compensate earnings to the residence country, usually paying a fee (percentage defined in the treaty, calculated on the gross amount assessed) once a year.[13] Still other treaties will allow source country taxation if a certain percentage of the employee's worldwide income consists of employment income earned in the source country.

2.3. Frontier workers' uncertainty in the COVID-19 pandemic

[26] The health crisis triggered by the COVID-19 pandemic forced the world of work, including frontier workers, to change habits and to exploit (where possible) digital instruments to supply the physical restraints of individuals. The emergency *status* is expected to end on 31 March 2022.[14]

[27] In fiscal terms, it implies some troubles in respecting the mentioned *criterion* of physical presence to identify the source state.[15] Indeed, what happens in home office circumstances? The employee is no longer required to work in the office, where (s)he used to be. And what about emergency measures adopted by several states, providing for quarantine or for limitation of free movement? Which rule must apply? Do employers still have duties related to salaries and wages or not?

[28] Given the above, in remote working circumstances, the requirement to return home falls. So, the frontier worker shall still be deemed as a commuter, or (s)he must be taxed under ordinary rules (art. 15 OECD MTC)?

[29] Mindful of the tax consequences of extraordinary circumstances, the OECD intervened by publishing a brief guideline.[16] Among other issues, it approached frontier workers, stating that such a crisis represents a *force majeure*: an exceptional hypothesis.[17] To avoid tax uncertainty and additional compliance difficulties for both taxpayers and fiscal administrations, OECD suggested countries keep the *status quo ante*.

[30] Applying this principle to cross-border commuters, it follows that even if missing the daily-back *criterion*, the employee shall be considered as frontier worker since the emergency *status* persists. The exercise of taxing powers depends on the enforced provision under relevant treaties.

[31] On the one hand, if under the DTA the exclusive taxing right belongs to the residence state, the same will continue to tax income from employment of commuters.

[32] *Viceversa*, the source state shall keep its taxing sovereignty on income from employment since it is deemed as the place in which the employee is used to work in. This *fictio iuris* prevents issues such as more compliance duties, absence of law underpinning the withholding tax

12 European Parliament, Directorate-General for Research, Frontier workers in the European Union, 2017, retrieved at https://www.europarl.europa.eu/workingpapers/soci/w16/summary_en.htm?textMode=on (last accessed on 29 March 2022).

13 See *infra*.

14 As the date of finalizing this paper, 28 March 2022.

15 OECD MTC, Commentary, *ad* art.15 para 1, pp. 307 ss.

16 OECD Secretariat Analysis (note 3).

17 In particular, the OECD focused on permanent establishment, place of effective management, cross-border workers, and tax residence of individuals.

eventually applied by employers, suspension or refunding mechanisms, and so on. «*Exceptional circumstances call for an exceptional level of coordination between countries to mitigate compliance and administrative costs for employees and employers associated with involuntary and temporary change of the place where employment is performed*», the OECD stated.[18]

[33] Notwithstanding, the OECD document was not binding as soft law. The best tool able to clarify the situation, without amending enforced tax treaties, was the procedure defined under art. 26 OECD MTC. Several jurisdictions, indeed, have signed mutual agreements on the tax treatment of commuters, where, following the OECD's recommendations, they have concurred on the application of pre-existing conditions until the emergency *status* would end.[19]

[34] Only in January 2021, the OECD issued updated guidance.[20] Once again, frontier workers are on the list of debatable issues, but the guide merely refers to specific agreements already in force.[21]

[35] The Update Guidance, in particular, addresses the main topic of teleworking, stating that a change in the place where employment is exercised may lead to a change in the allocation of taxing rights under the current treaty rules.[22]

2.4. From teleworking to telecommuting

[36] The OECD Update Guidance offers a couple of examples related to teleworking and its tax consequences.

[37] *Case a*. Before COVID-19, the employee resident in State A was used to carry out her/his working activity in State B. Due to restrictions, (s)he started working from the residence state. Under art. 15 OECD MTC, requirements drawn by para. 2 must be evaluated. It means that if the employer was resident in State B, this latter, as source country, is entitled to tax income from employment derived while the employee was physically in State B (i.e., a reduction in State B's taxing rights).[23] Differently, if the employer was not resident in State B (and did not bear the cost of the employee's salary through a permanent establishment therein) and if the employee did not satisfy the presence test (staying more than 183 days in State B), State A, as residence jurisdiction, would get the exclusive taxing power.

[38] *Case b*. Before COVID-19, the employee resident in State A remained stuck in State B, where (s)he is forced to exercise her/his working activity. Applying ordinary rules, State B's entitlement for taxing income from employment depends on the residence of the employer. If this latter was also resident in State B (or bore the cost of the employee's wage through a permanent establish-

18 OECD, Secretariat analysis (note 3), para 62, p. 18.

19 OECD, Secretariat analysis (note 3), Box 4 – Guidance on taxation of employment income and sample competent authority arrangements, p. 18. Switzerland signed mutual agreements accordingly to OECD recommendations, with France, Germany, Italy and the Principality of Liechtenstein.

20 OECD, Updated guidance on tax treaties and the impact of the COVID-19 pandemic, 21 January 2021, retrieved at https://www.oecd.org/coronavirus/policy-responses/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic-df42be07/ (last accessed on 29 March 2022); Báez Moreno (note 3).

21 Despite this, both OECD documents also address tax residency of individuals, the creation of a permanent establishment, and telework. These concerns are kept apart from commuters, but it is important to bear in mind that in absence of specific rules ordinary provisions apply, for instance, in terms of residency. This makes the difference.

22 OECD, Update guidance (note 17), para. 59, p. 17.

23 OECD, Update guidance (note 17), para. 61, p. 17.

ment in that country), the state of source should tax the employment income. Differently, if the employer was resident abroad, the 183-day presence test should be satisfied.

[39] As mentioned, even the Update Guidance is only a soft law document, not binding for countries and without direct effect in concrete terms. It means that the definition of such issues belongs to the discretionary power of each jurisdiction. Several states addressed the topic, releasing their standings.[24] As a rule of thumb, the pandemic is compared to a *force majeure* event and, as such, changes must be considered as temporary.[25]

[40] Notwithstanding, some countries (Australia) apply such principle only within specific temporal thresholds; once passed, tax authorities are allowed to evaluate if the stay of the employee is due to COVID-19 restrictions or if there are other elements that may lead to identify the taxpayer as resident therein.[26]

[41] The matter is that national assessments are based on the domestic tax residence concept. Even during the emergency and given the above, the OECD recognizes the possibility of a change in an individuals' tax residence.

[42] Leaving apart the case of an individual stuck on holiday in a country different from the residence and the source ones, it is worth addressing the case of those individuals who came back to their country of origin (the so-called expats) during the COVID-19 pandemic.[27]

[43] Indeed, it is not uncommon that a person working in a jurisdiction (State A, namely the «current home jurisdiction») where (s)he acquired the residence *status* temporarily returns to her/his «previous home jurisdiction» because of the pandemic. (S)he may either never have lost her/his *status* as resident of the previous home jurisdiction under its domestic legislation, or may regain residence *status* on her/his return.[28] Moving from national law to tax treaties, it is unlikely that (s)he would be deemed as resident due to such temporary dislocation «*if [her/his] connections to the current home jurisdiction are stronger than those to the previous home jurisdiction*».[29]

[44] Tie-breaker rules defined by art. 4 OECD MTC apply, but they do not necessarily provide a clear solution for taxpayers. Usually, the person's attachment to the «country of origin» is stronger. Let's assume that the individual has a permanent residence in both countries. In cases where personal and economic relations in the two jurisdictions are close but the tie-breaker rule was in favor of the current home jurisdiction, moving to the «country of origin» during the pandemic «*may tip the balance towards*» this latter state. So, the swing vote belongs to the habitual abode test, which must not be limited to count the number of days spent in one country, but which also refers to frequency, duration, and regularity of stays that are part of the settled routine of an individual's life.[30]

[45] Given these premises, the question arises as to the future of teleworking from a fiscal perspective. Such guidance addresses the topic in the emergency context, but what will happen when the pandemic finally ends?

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24 OECD, Update guidance (note 17), Box 4, p. 18.

25 OECD, Update guidance (note 17), Box 4, p. 18.

26 OECD, Update guidance (note 17), Box 4 – Australia, p. 18.

27 OECD, Update guidance (note 17), para 39, p. 13.

28 OECD, Update guidance (note 17), para 39, p. 13.

29 OECD, Update guidance (note 17), para.41, p. 14.

30 OECD, Update guidance (note 17), para 44, p. 14; OECD MTC, Commentary, *ad* art. 4, para 19.

[46] The same considerations should be made concerning cross-border workers, i.e. individuals who are tax residents in one state, live near the border with another country, work in this latter and come back home daily/weekly.

[47] In 2020, at the early beginning of the emergency, employees had to face two different hypotheses: those who were stranded in their residence state, recurring to remote working, and others asked by employers to stay in the source state to avoid freedom restrictions. So, again cases *a* and *b*.

[48] The majority of these situations fall under specific mutual agreements signed by involved countries, which have a retroactive effect. Apparently, no matter. Some concerns arise with regard to the future of so-called telecommuting. Specific agreements have only temporary effectiveness: what about the next few years?

[49] The big mistake is that states are deluding themselves that everything will return to normal, not realizing that this is the new normal.

[50] Maintaining actual rules, it is possible to identify four main *scenarios*. An employee, resident in State A, near the border, used to physically exercise her working activity in State B, the source jurisdiction.[31]

- *Full-time telecommuting from residence state*. After the pandemic ends, the employee opts for remote working. Assuming that she decides to work from home, what will be the tax consequences? First of all, the daily-back home *criterion* falls, and she can no longer be defined as frontier worker. It follows that art. 15 OECD MTC applies. On the basis of the physical *nexus* (*«where the working activity is physically exercised»)*, the employee must be taxed in her residence state, entitled to exclusive taxing power. Source jurisdiction cannot impose employment income.[32]
- *Full-time telecommuting from abroad*. In this case, it is possible to assume that the employee opts for remote working, but she decides to work remotely from a jurisdiction that differs from the residence state. This situation is comparable to the so-called digital nomads' *phenomenon*. Under enforced rules, the exclusive taxing right remains to the residence state, even if the topic is under international debate. Some countries, especially in the US, are examining the feasibility of allocating taxing powers to the other state, where the employee is *de facto* remotely working.[33]
- *Part-time telecommuting*. The employee opts for remote working but only for a fixed percentage of her work time (for instance, 40%). In this case, she will continue to be considered as a frontier worker, since the *criteria* are still satisfied even if with some exceptions. A potential solution, according to already existing treaties, shall be the definition of a temporal thresh-

31 Kostiç (note 2); Kim (note 2); Báez Moreno (note 3). See also Yvette Lind, Comparing Apples and Kiwis – An unexpectedly fruitful endeavor when discussing the pandemic's effects on transnational taxpayers, in: Copenhagen Business School, Law Research Paper Series n. 21–08, p.1–12, retrieved at: https://ssrn.com/abstract=39091114 (last accessed on 29 March 2022); Wojciech Morawski/Blazej Kuzniacki, The German-Polish Tax Problems of Cross-border workers in the COVID-19 Pandemic – When the Remediy is Worse than the Problem, in: Bialystok Legal Studies, Bialostockie Studia Prawnicze, vol. 26, n. 4, 2021, p. 95–110.

32 This hypothesis must be taken apart from circumstances where the employer requires a change in the place of work, due to work needs. In that case, it is reasonable that this circumstance may be considered as covered by the threshold of exemption from the physical presence in the office or similar to posted workers. See, also Kim (note 2), pp. 1208 ss.

33 Kim (note 2), p. 1171 ss.

old (usually, 45 days *per* year), where the employee is allowed to derogate the daily-back requirement. It would be necessary to make an explicit provision for telecommuting. Differently, where the source state is entitled to tax employment income, the percentage shall be properly reduced and attributed to the state of residence. *Viceversa*, where the agreed percentage of remote working represents more than 50% (i.e. 60%), reasonably the state of residence shall exercise the exclusive taxing right, allowing the source state to withhold a percentage as compensation for time spent on its territory or getting a compensation fee from the home country.

- *No telecommuting*. The employee returns to her old ways, physically moving every day to the source state. In this case, no troubles arise.

[51] The main issue is that, even if cross-border workers are only a strict category of workers impacting a small percentage of countries, they are meant to also become part of the new group of teleworkers. Hence, if the international community decides to address the fiscal regime of remote work, such future discipline will necessarily have consequences also for commuters.

[52] Before giving some remarks on the potential renewable tax framework, this paper will address the Swiss' state of the art on commuters.

3. A Swiss overview on commuters

3.1. Some numbers

[53] Switzerland's strategic geographical position ensures an active flow of workers. Under official statistics, at the end of 2020, the number of commuters was at 343'000.[34] The number had more than doubled since 1998. The commuters represent 6.7% of the Swiss workforce.

[54] During the last 25 years, the number of frontier workers increased due to several reasons: first of all, the introduction of free movement of persons, through the Agreement between the European Community and its Member States and the Swiss Confederation on the free movement of persons (RS 0.142.112.681; hereinafter, AFM) and the economic growth. Indeed, since the agreement entered into force, the market registered an average of 2.7% increase of workers.

[55] More than half of the commuters come from France (55%), almost a quarter from Italy (23%), and less than a fifth from Germany (1.8%).[35]

[56] While the highest absolute number of commuters can be found in the Canton of Geneva (90'000 individuals), data change if one considers their share of the total amount of persons in employment: the highest proportion is in the Canton Ticino, where it stood at 29%, while in the Canton of Geneva it is at 24%. Other Cantons which record a high number of frontier workers are Jura (19%), Basel-Stadt (18%), Basel-Landschaft (14%), and Neuchâtel (12%).

34 Federal Statistical Office, Frontier workers in Switzerland 1996–2020, retrieved at https://www.bfs.admin.ch/bfs/en/home/statistics/work-income/surveys/ccs.assetdetail.17205541.html (last accessed on 29 March 2022).

35 In addition, less than 3% come from Austria or Liechtenstein, while 0.7% come from other countries, such as Poland, Slovakia, and Hungary.

3.2. Cross-border workers: agreements with neighboring countries

[57] Switzerland counts on a dense network of agreements and treaties, especially with neighboring countries, addressing the tax treatment of cross-border workers. The DTAs with Austria and Liechtenstein directly address the fiscal regime of commuters. Differently, France, Germany, and Italy signed specific agreements with Switzerland, apart from DTAs.[36]

[58] Before briefly having a look at each bilateral agreement, it must be stressed that in 2002, when the AFM entered into force, a «unique» definition of frontier worker was established for the first time. Indeed, under art. 28 AFM, entitled «*Employed frontier workers*», an employed frontier worker is «*a national of a Contracting Party who has his normal place of residence in the frontier zones of Switzerland or neighboring states and who pursues an activity as an employed person in the frontier zones of another Contracting Party returning as a rule to his principal residence every day, or at least once a week*».

[59] To grant coexistence with tax treaties, art. 21 AFM provides that «*the provisions of this Agreement shall not affect the double taxation agreements' definition of ‹frontier workers›*».

[60] Given these premises, the following paragraphs aim to summarize the state of the art on specific provisions for commuters.[37]

3.2.1. Austria

[61] Until the entry into force of the mentioned Agreement of free movement of persons (2002), the DTA signed between Austria and Switzerland (hereinafter, A-CH)[38] encompassed the fiscal treatment of frontier workers.[39] Art. 15 (4) then in place assigned an exclusive right to the state of residence, but leaving the source state the possibility to withhold a 3% tax on commuters' income from employment.

[62] From 2002 onwards, this provision has been repealed. Actually, A-CH DTA does not mention cross-border workers. The so-called place of work principle applies under art. 15(1).[40] It must

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36 Such agreements may be considered as part of the relevant DTA. See Marco Bernasconi, La Convenzione italo-svizzera contro le doppie imposizioni e l'accordo dei frontalieri, Tesi di laurea, Università Cattolica del Sacro Cuore, Milano, 1989, 294; Samuele Vorpe/Peter Altenburger, Das neue Abkommen zwischen der Schweiz und Italien über die Besteuerung der Grenzgänger, ASA 90 – Nr. 3 – 2021/2022, p. 81–144, retrieved at https://www.supsi.ch/fisco/dms/fisco/docs/pubblicazioni/articoli/ASA_das-neue-abkommen-zw_79598e9fdf_-de.pdf (last accessed on 29 March 2022); Franziska Stadtherr-Glättli/Janine Geissler, §6 Steuerfragen bei Homeoffice, in: Isabelle Wildhaber (ed.), Handbuch Homeoffice, IN PRAXI, 2021, p. 153–176.

37 See also Renè Matteotti/Peter Vogt/Natalija Ezzaini, Switzerland settles mutual agreements for remote working, in International Tax Review, London, 11 February 2021, retrieved at https://www.internationaltaxreview.com/article/b1qhpclz9q3l6g/switzerland-settles-mutual-agreements-for-remote-working (last accessed on 29 March 2022).

38 Austria–Switzerland Income and Capital Tax Treaty, 1974, retrieved at https://www.fedlex.admin.ch/eli/cc/1974/2085_2085_2085/de (last accessed on 29 March 2022).

39 As defined in art. 15(4) A-CH DTA (2001 version), a frontier worker is a resident in the border area of one Contracting Party, carrying out his working activity within the border area of the other Contracting State. Retrieved at https://www.fedlex.admin.ch/eli/cc/1974/2085_2085_2085/fr (last accessed on 29 March 2022). See also Marco Bernasconi/Donatella Negrini/Francesca Amaddeo, L'Accordo sui frontalieri del 1974 sotto esame, in: Novità fiscali, n. 7, 2020, p. 402–420.

40 It is worth noting that Austrian DTAs with other neighboring countries, such as Germany, Liechtenstein, and Italy, contain specific provisions related to cross-border workers. «*The DTCs define cross-border workers as workers who commute across the border every (working) day and whose place of residence and place of work are both close to the border. If an individual qualifies as a cross-border worker under the DTC, their earnings are taxed in their country of residence. Austria does not have the right to tax these individuals if they are not residents in Austria. [...] There are no such pro-*

be pinpointed that in the Final Protocol to the A-CH DTA, the fourth paragraph obliges Switzerland to pay a compensation fee of up to 12.5% to the Austrian government.[41] The two countries agreed on a reserve stating that a bilateral fiscal equalization will be evaluated where the frontier workers' flow changes.

[63] During the COVID-19 pandemic, no mutual agreement has occurred between Austria and Switzerland.

3.2.2. Germany

[64] Under art. 15(a) of the DTA signed between Germany and Switzerland (hereinafter, CH-D DTA),[42] the state of residence has the main taxing right on income from employment of commuters. The source jurisdiction shall apply up to 4.5% withholding tax on this latter.[43]

[65] Art. 15(a)(2) defines a commuter as an employee, resident in one contracting state, who is working in the other jurisdiction, but regularly returns to her/his domicile. The requirement to return home may be waived without losing the commuter *status* if the worker does not return home for a maximum of 60 days *per* year «*due to his working activity*».[44]

[66] Authors lead back the threshold to full-time employment.[45] A more precise guide in the interpretation of such a clause is highly recommended if seen in the light of remote work. Is telecommuting accepted under the 60 days threshold?

[67] Thus, on 16 June 2020, Germany and Switzerland signed a mutual agreement[46] (under art. 26 CH-D DTA) following OECD recommendations. They agreed to apply that days spent working from home due to COVID-19 pandemic measures (as well as days spent at home without performing work activities but with continued pay due to Corona) will be deemed as spent in the source state. *Viceversa*, days spent in the state of employment where the employer reimburses accommodation expenses are not considered as days of non-return. This is a *fictio iuris* that enables to safeguard the home-back daily *criterion*.

[68] It is worth noting that such a rule will not apply to working days which would have been spent in the home office anyway or in third countries, in particular, if home office is part of the

visions in Austria's DTCs with other neighboring countries (including the Czech Republic, Hungary, Slovakia, Slovenia and Switzerland). Accordingly, cross-border workers from these countries can generally be subjected to taxation in Austria on the basis that their income is earned within Austria.», the Austrian government issued on its official website, retrieved at: https://www.oesterreich.gv.at/en/themen/steuern_und_finanzen/arbeitnehmerveranlagung/einkommensteuerrechtliche-regelungen-fuer-grenzgaenger-nach-oesterreich.html (last accessed on 29 March 2022).

41 Final Protocol to A-CH DTA, para. 4: «*Switzerland is deemed to pay an annual 12.5% compensation fee to the Austrian Ministry of Finance for all those Austrian residents following under art. 15, para. 1 who earn income from employment.*»

42 Germany-Switzerland Income and Capital Tax Treaty – 1971, retrieved at https://www.fedlex.admin.ch/eli/cc/1972/3075_3128_2910/de (last accessed on 29 March 2022).

43 It is also required that the competent authority certifies the residence *status* of the employee by an official document.

44 See also Vorpe/Altenburger (note 36), p. 109; Marc Enz, Grenzgängerregelungen, Bern, 2012, p. 292 ss. and p. 403.

45 See also Vorpe/Altenburger (note 36), p. 109; Enz (note 44), p. 292 ss. and p. 403.

46 Mutual agreement on cross-border workers signed between Switzerland and Germany on 11 June 2020, retrieved at https://www.estv.admin.ch/dam/estv/fr/dokumente/international/laender/deutschland/de-dba_kv_covid-19.pdf.download.pdf/de-dba_kv_covid-19.pdf (last accessed on 29 March 2022).

contractual labor agreements.[47] Moreover, the employer is required to collect evidence, such as a statement by the employer on days spent in the home office due to Corona. This mutual agreement has been extended until 31 March 2022, when the end of the emergency *status* may be declared.[48]

[69] The mutual agreement excludes the contractual home office's option from the 60 days threshold as an exception to the daily return to the domicile.

[70] The CH-D DTA is still silent on an eventual (definitive) shift to telecommuting.

3.2.3. Liechtenstein

[71] Under art. 15 of the DTA between Switzerland and the Principality of Liechtenstein (hereinafter, CH-FL DTA),[49] only the state of residence may assess taxes on a frontier workers' income from employment. As above, the commuter is allowed to not return to his country of residence without losing the frontier-worker *status* for 45 days *per* year.

[72] On 22 October 2020, according to OECD guidelines, the two countries signed a mutual agreement (under art. 26 CH-FL DTA)[50] keeping the *status quo ante*.

[73] Even in this case, the employer is required to certify the period during which the employer worked from home due to emergency measures. So, it is possible to prevent double taxation situations.[51]

[74] Also in this case, no provision addresses the issue of remote work.

3.2.4. France

[75] The DTA signed between Switzerland and France (hereinafter, CH-F DTA)[52] recalls, at art. 15, a specific agreement on frontier workers, dated 11 April 1983.[53] The exclusive taxing right belongs to the state of residence. As a compensation fee, the source jurisdiction shall receive the 4.5% of the total amount of the annual gross remuneration.

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47 Andreas Perdelwitz, COVID-19 Pandemic: Emergency Tax Measure – Germany and Switzerland Sign Agreement on Taxation of Frontier Workers, IBFD, 16 June 2020.

48 The mutual agreement on Frontier Workers between Switzerland and Germany, signed on 16 June 2020, has been firstly extended until 31 March 2021, then until 30 June 2021, 30 September 2021, 31 December 2021, and now until 31 March 2022. All versions shall be consulted at https://www.estv.admin.ch/estv/fr/accueil/droit-fiscal-international/international-par-pays/sif/allemagne.html (last accessed on 29 March 2022).

49 Principality of Liechtenstein-Switzerland Income and Capital Tax Treaty – 2015, retrieved at https://www.fedlex.admin.ch/eli/cc/2016/763/de (last accessed on 29 March 2022).

50 Mutual agreement on cross-border workers signed between Switzerland and the Principality of Liechtenstein signed on 20 October 2020, retrieved at https://www.estv.admin.ch/dam/estv/de/dokumente/international/laender/liechtenstein/20201020_verstaendigungsvereinbarung_liechtenstein.pdf.download.pdf/20201020_Verstaendigungsvereinbarung_Liechtenstein.pdf (last accessed on 29 March 2022).

51 Andreas Perdelwitz, COVID-19 Pandemic: Liechtenstein and Switzerland Sign Agreement on Taxation of Frontier Workers, IBFD, 29 October 2020. On 2 March 2022, Liechtenstein and Switzerland announced the termination of the mutual agreement, which will cease to apply with effect from 31 March 2022. See, Roger Cadosch, COVID-19: Liechtenstein and Switzerland terminate agreement on taxation of frontier workers, IBFD, 3 March 2022.

52 France – Switzerland Income and Capital Tax Treaty – 1966 – retrieved at https://www.fedlex.admin.ch/eli/cc/1967/1079_1119_1113/fr (last accessed on 29 March 2022).

53 Agreement on cross-border workers signed between France and Switzerland, 11 April 1983, retrieved at https://www.estv.admin.ch/dam/estv/fr/dokumente/international/laender/france/Accord-frontaliers_19830411.pdf.download.pdf/Accord%20frontaliers%2011%20avril%201983.pdf (last accessed on 29 March 2022).

[76] It is worth mentioning that the agreement defines commuter at article 3,[54] based on both the spatial and the temporal *criteria*.[55] Despite this, in 2005, the two countries specified through an exchange of letters some aspects of what a «frontier worker» is, especially concerning the frequency of mobility and the daily back-home requirement.[56] Also, this agreement grants commuters the maintenance of their *status* if they do not return home up to 45 days *per* year.

[77] Such rules apply to the Cantons of Bern, Solothurn, Basel-Stadt, Basel-Land, Vaud, Valais, Neuchâtel and Jura.

[78] A special agreement has been signed between France and the Canton of Geneva, establishing that the place-of-work principle pursuant to art. 17 CH-F DTA applies. In return, the Canton of Geneva pays an annual amount of 3.5% of the gross wages paid to frontier workers residing in the districts of Ain and Haute-Savoie.

[79] On 18 May 2020, France and Switzerland signed a mutual agreement to face the emergency stating that days spent working from home due to COVID-19 will be deemed as to be spent in the state where the commuter would have ordinarily carried out the work.[57]

[80] There does not seem to be an open discussion about the tax regime applicable to telecommuting.

3.2.5. Italy

[81] As mentioned, official statistics[58] show that Switzerland can count more than 85'000 Italian residents crossing the border every day to work in a neighboring Canton among Graubünden, Valais, and Ticino. The most are concentrated in the latter, where commuters represent the higher share of total dependent employment.

54 Art. 3 Agreement on cross-border workers between Switzerland and France states that: «*L'expression ‹travailleur frontalier› désigne toute personne résidente d'un Etat qui exerce une activité salariée dans l'autre Etat chez un employeur établi dans cet autre Etat et qui retourne, en règle générale, chaque jour dans l'Etat dont elle est le résident.*»

55 V. *supra*.

56 Exchange of letters between France and Switzerland concerning the tax treatment of cross-border workers, retrieved at https://www.estv.admin.ch/dam/estv/fr/dokumente/international/laender/france/Fiche-Accord-frontaliers_19830411.pdf.download.pdf/Fiche%20Accord%20frontaliers%2011%20avril%201983.pdf (last accessed on 29 March 2022).

57 Mutual agreement on cross-border workers signed between France and Switzerland, 16 June 2020, retrieved at https://www.estv.admin.ch/dam/estv/fr/dokumente/international/laender/france/fr-dba-aa-20200716.pdf.download.pdf/fr-dba-aa-20200716.pdf (last accessed on 29 March 2022). As in the case of Germany, the agreement initially enforced until 31 May 2020, has been extended, through a series of renewals, until 31 March 2022. For more details, https://www.estv.admin.ch/estv/fr/accueil/droit-fiscal-international/international-par-pays/sif/france.html (last accessed on 29 March 2022).

58 Federal Statistical Office, Cross-border commuters https://www.bfs.admin.ch/bfs/en/home/statistics/work-income/employment-working-hours/economically-active-population/cross-border-commuters.html (last accessed on 29 March 2022).

3.2.5.1. The 1974 Agreement on frontier workers between Switzerland and Italy

[82] Art. 15 (4) of the DTA signed between Italy and Switzerland (hereinafter, CH-I DTA)[59] recalls, as in the French case, a specific agreement on cross-border workers. It dates back to 1974 and it differs from other similar agreements signed by Switzerland.[60]

[83] Indeed, the 1974 Swiss-Italian Agreement comprises only a few articles, missing a series of crucial issues. Its inconsistencies reached their peak during the pandemic. Unlike the agreements above, the 1974 Swiss-Italian Agreement includes neither a definition of «cross-border worker» nor a period while cross-border workers can derogate from the daily-back home requirement.[61]

[84] As an exception to general tax rules, the 1974 Swiss-Italian Agreement grants exclusive taxing rights on income from dependent employment to Switzerland as source jurisdiction. To that effect, Swiss employers apply a withholding tax on Italian commuters' salaries.[62]

[85] At the end of the fiscal year, the Canton Ticino (with the Cantons Graubünden and Valais) must pay a compensation fee (38.8% of the gross amount of taxes collected)[63] to the Italian municipalities located within 20 kilometers of the Swiss border.[64]

3.2.5.2. The 1974 Agreement and pandemic troubles

[86] As explained above, in contrast to other tax treaty agreements, the 1974 Swiss-Italian Agreement does not contain any measure derogating the daily back-home requirement, nor does it include any guidance for force *majeure situations*, such as the COVID-19 pandemic.

[87] Thus, tax doubts arose concerning the commuters who were stuck in Switzerland, where the employer offered to pay for accommodation to avoid restraints. Moreover, what about those workers who were forced to move their activities from the office to their homes?

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59 Italy-Switzerland Income and Capital Tax Treaty – 1976 – retrieved at https://www.fedlex.admin.ch/eli/cc/1979/461_461_461/it (last accessed on 29 March 2022).

60 Agreement on cross-border workers signed between Italy and Switzerland on 3 October 1974, retrieved at https://www.fedlex.admin.ch/eli/oc/1979/457_457_457/it (last accessed on 29 March 2022).

61 Only from Italian parliamentary reports, it is possible to identify the concept of a frontier worker, applicable under the 1974 Agreement, as «the worker who works in Switzerland, but which, at the end of the workday, comes back to his/her home in Italy». See Italian Parliament, 1 July 1975, VI legislature, Discussions, p. 22627 ss. – On. Marchetti Declaration. The same interpretation of the concept of «frontier worker» under the 1974 Agreement was adopted by the Italian tax authorities. See Agenzia delle Entrate, Direzione Regionale Lombardia, Ufficio fiscalità generale, Prot. n. 904/45720/2008; Ruling 904-276/2008 of 27 March 2008; Agenzia delle Entrate, Resolution n. 38/E of 28 March 2017; Agenzia delle Entrate, Ruling Reply No. 904–8/2019. It is worth noting that even though Switzerland usually represents the source state, while Italy is the residence jurisdiction, also *vice versa* issues are covered by the 1974 Agreement.

62 Vorpe/Altenburger (note 36); see also Andrea Opel, Möglichkeiten und Folgen einer einseitigen Kündigung des Grenzgängerabkommens zwischen der Schweiz und Italien, Rechtsgutachten, Luzern, 15 July 2020, 33.

63 The CH-I DTA provides a compensation fee of 40%. The threshold decreased after the so-called «Verbale di Roma-Lugano», released after a couple of meetings occurred in 1985, during which the Swiss delegation highlighted the changes from the previous scenario. Specifically, fewer commuters used to return home daily, usually preferring to stay in Switzerland during the week, coming back only for the weekend. As a consequence, the compensation fee had to be re-calculated. The two delegations agreed to reduce a 3% of the total tax assessment on commuters' income: it follows the decrease of the compensation fee from 40% to 38.8% (i.e. the 3% of 40%). See Marco Bernasconi, L'accordo tra la Svizzera e l'Italia relative all'imposizione dei frontalieri e alla compensazione finanziaria a favore dei Comuni italiani di confine del 3 ottobre 1974, RTT, June 1990, 293. As early as 1985, the rapid transformation of the phenomenon became clear.

64 Since the New 2020 Agreement, how to determine this 20 km area was highly discretionary. Indeed, there was not an official list with all municipalities encompassed by the agreement.

[88] The main question concerned the possibility of still considering all those Italian workers who remained in Switzerland or worked remotely from Italy as cross-border workers under the Italy-Switzerland agreement.

[89] Since the daily return home is an essential requirement to the definition of a cross-border worker under the 1974 Swiss-Italian Agreement, arguably, frontier workers that must remain in either the source or residence state because of the pandemic could no longer qualify as commuters. Thus, the special provisions of the 1974 Swiss-Italian Agreement addressing this issue (and the related Article 15(4) CH-I DTA) would not have been applicable. The general rules for the taxation of income from employment encompassed art. 15(1) of the CH-I DTA (which mirrors art. 15 OECD Model), would instead apply.

[90] Given the above, Switzerland as the source state should have claimed taxing rights for Italians who remained in the Swiss territory to perform their employment. This would have applied despite the COVID-19 situation. For Italians forced to telework from their home in Italy, general rules seemed to grant Italy, as a residence state, the exclusive taxing right over private employment income. Because of the 1974 Swiss-Italian Agreement tax structure, this would have represented a problem for both employees and employers.

[91] So, in June 2020, Switzerland finally signed a mutual agreement with Italy.[65] Even in this case, following the OECD recommendations, no changes in allocating taxing rights would have been made as long as the emergency persisted. All days spent in the residence state through remote working due to COVID-19 must be considered time spent in the source state. Switzerland keeps its exclusive taxing rights on income from dependent employment of Italian cross-border workers.[66]

[92] This agreement has been tacitly renewed and will remain in force at least as the emergency *status* is declared, until 31 March 2022.

3.2.5.3. The 2020 Agreement on cross border workers between Switzerland and Italy

[93] In December 2020, somewhat unexpectedly, Switzerland and Italy signed a new treaty on cross-border workers, repealing the old 1974 Agreement.[67] This new set of rules represents a profound change in the tax treatment of commuters.[68]

[94] The principle of the place of work falls. The state of residence, usually Italy, acquires exclusive taxing rights on the commuters' income from employment. The source jurisdiction, in most

65 Mutual agreement on cross-border workers signed between Italy and Switzerland, 20 June 2020, retrieved at https://www.estv.admin.ch/dam/estv/fr/dokumente/international/laender/italien/it-dba_kv_covid-19.pdf.download.pdf/it-dba_kv_covid-19.pdf (last accessed on 29 March 2022).

66 This mutual agreement is particularly relevant also because it provides, for the first time, a written definition of frontier worker within Swiss-Italian tax agreements.

67 Amaddeo (note 11); Vorpe/Altenburger (note 36), p. 96 ss.

68 Such changes were required by the evolving framework both at the juridical and the economic level. First of all, the mentioned Agreement on the free movement of persons, in force since 2002, extended the commuter concept. Secondly, the number of cross-border workers, especially in Ticino, increased appreciably: they passed from 33'000 to more than 70'000 units in 2003–2020. Such a growth finds its main ratio in the combination of higher Swiss wages, low tax pressure and cheap cost of living, staying in Italy.

circumstances Switzerland, would keep limited taxing rights (the share cannot exceed 80% of the applicable withholding tax).[69]

[95] The tax regime for the so-called «new commuters», i.e., workers who satisfy the requirements, starting from the enforcement of the 2020 New Swiss-Italian Agreement, is expected to enter into force on 1 January 2023.

[96] Differently, individuals who work or have worked in the Cantons of Graubünden, Ticino or Valais between 31 December 2018 and the date of entry into force of the new agreement, the so-called «old commuters», will continue to be subject to the 1974 Agreement's tax regime. Italian border municipalities will receive the compensation fee but only until 2033. Despite this, Switzerland will maintain its exclusive taxing rights over the old commuters' employment incomes.[70]

[97] It is worth pinpointing that the 2020 new Swiss-Italian agreement introduces *(i)* a written definition of commuter, aligning the treaty to general definitions above, and *(ii)* a threshold of 45 days *per* year during which the frontier worker may derogate to the daily return home requirement. This exception can be given for «work reasons only». Personal reasons are therefore excluded. There is no expressed fence of «working reasons», but the provision allows the worker to remain in the source state only (and, eventually, in a third country). The stay in the residence state is not covered by the threshold. This wording clearly emphasizes the underestimation of the remote (home) working phenomenon.

[98] Even the most recent 2020 Swiss-Italian Agreement is silent on telecommuting.

[99] Only a clause enshrined in the Annex of the 2020 Agreement mentions remote working. Switzerland and Italy commit to frequently monitor the teleworking evolution and, if it were the case, an amendment to the agreement would be discussed between the parties under the mutual agreement provided by art. 26 CH-I DTA.

4. Conclusive remarks

[100] Telecommuting is subverting the notion of frontier workers. The emergency *status* is expected to end by 31 March 2022. Most mutual agreements signed will then lose their validity.

[101] The future of commuters is still vague. The international community will soon have to address the four *scenarios* above.

[102] Under current rules, solutions do not seem satisfactory. The physical *nexus* still pervades the allocation of taxing rights in income from employment circumstances. Remote work requires a careful evaluation in maintaining the dichotomy between residence state and source state (i.e. where the place of effective management of the company hiring the teleworker is). Indeed, such a scheme, mainly based on the physical presence test, creates ambiguities in allocating taxing rights as well as burdensome compliance costs.[71]

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69 Italy, when residence state, must grant a double tax credit. *Viceversa*, Switzerland exempts 4/5 of the income from employment earned by its residents in Italy. See Valentino Rosselli, Nuovo accordo tra Svizzera e Italia relativo all'imposizione dei lavoratori frontalieri, in: Novità Fiscali No. 4, 2021, p. 13–20; Vorpe/Altenburger (note 36), p. 96 ss.

70 Amaddeo (note 11); Vorpe/Altenburger (note 36), p. 96 ss; Matteotti/Vogt/Ezzaini (note 37).

71 Some interesting concerns shall be found in Niesten (note 4), pp. 134 ss.

[103] The same reasoning might be extended to frontier workers. Indeed, in the case of fully telecommuting, the *status* of commuters falls. It means that ordinary rules apply, with all the concerns mentioned. No issues arise for those who keep respecting the daily back home condition. Compensation mechanisms will continue to be applied, with some amendments, to those mixed situations where remote work combines with physical presence.

[104] In its updated guidance on tax treaties released in January 2021, the OECD admits that it is possible that a change of place where commuters exercise their employment may also affect the application of the special provisions dealing with cross-border workers. «*[T]hese provisions apply special treatment to the employment income [. . .] of cross-border workers and may often contain limits on the number of days that a worker may work outside the jurisdiction they regularly work before triggering a change in their status*», the guidance states.[72]

[105] From a Swiss perspective, on the basis of current agreements, interesting questions will arise about the recognition of telecommuting within the annual «exemption threshold» (i.e. 45 or 60 days) and, eventually, on changing to compensation fees.

[106] The only agreement mentioning remote working is the Italian-Swiss one, signed in 2020, which will, hopefully, enter into force by 2023. As mentioned, it encompasses a promise of evaluating a possible solution, whereas necessary for such circumstances.

[107] This clause cannot be considered sufficient to address future challenges. Bearing in mind that even this agreement contains the explained exemption threshold but for working reasons only and allows the stay mainly in the source state, which does not necessarily correspond to the home office regime, the risk of double taxation, mainly due to changes in the individual's tax residence, is not inconceivable.

[108] Telecommuting requires *ad hoc* solutions, which can be achieved only through the dialogue between involved jurisdictions. Time is running out and taxpayers need tax certainty.

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The article has been closed before 31 March 2022. At the date of publication, 11 April 2022, some jurisdictions declared the end of the emergency status. If in the case of the mutual agreement between Switzerland and France, in absence of an explicit denouncement, it has been tacitly renewed and extended until 30 June 2022, it is not possible to affirm the same in other cases. For instance, even if the provision of the mutual agreement signed with Italy requires – in any case – a public communication of competent authorities concerning the end of the special regime, all seems to be quiet. It is worth noticing that the complex net of agreements shall be misleading. Indeed, Switzerland, Italy, France, Germany, Austria and Liechtenstein, have signed special agreements on social securities (https://www.bsv.admin.ch/bsv/it/home/assicurazioni-sociali/int/basi-e-convenzioni/int-corona.html) which will apply until 30 June 2022. These are not rules applicable to the taxation of commuters.

72 See also Báez Moreno (note 3), p. 826.