

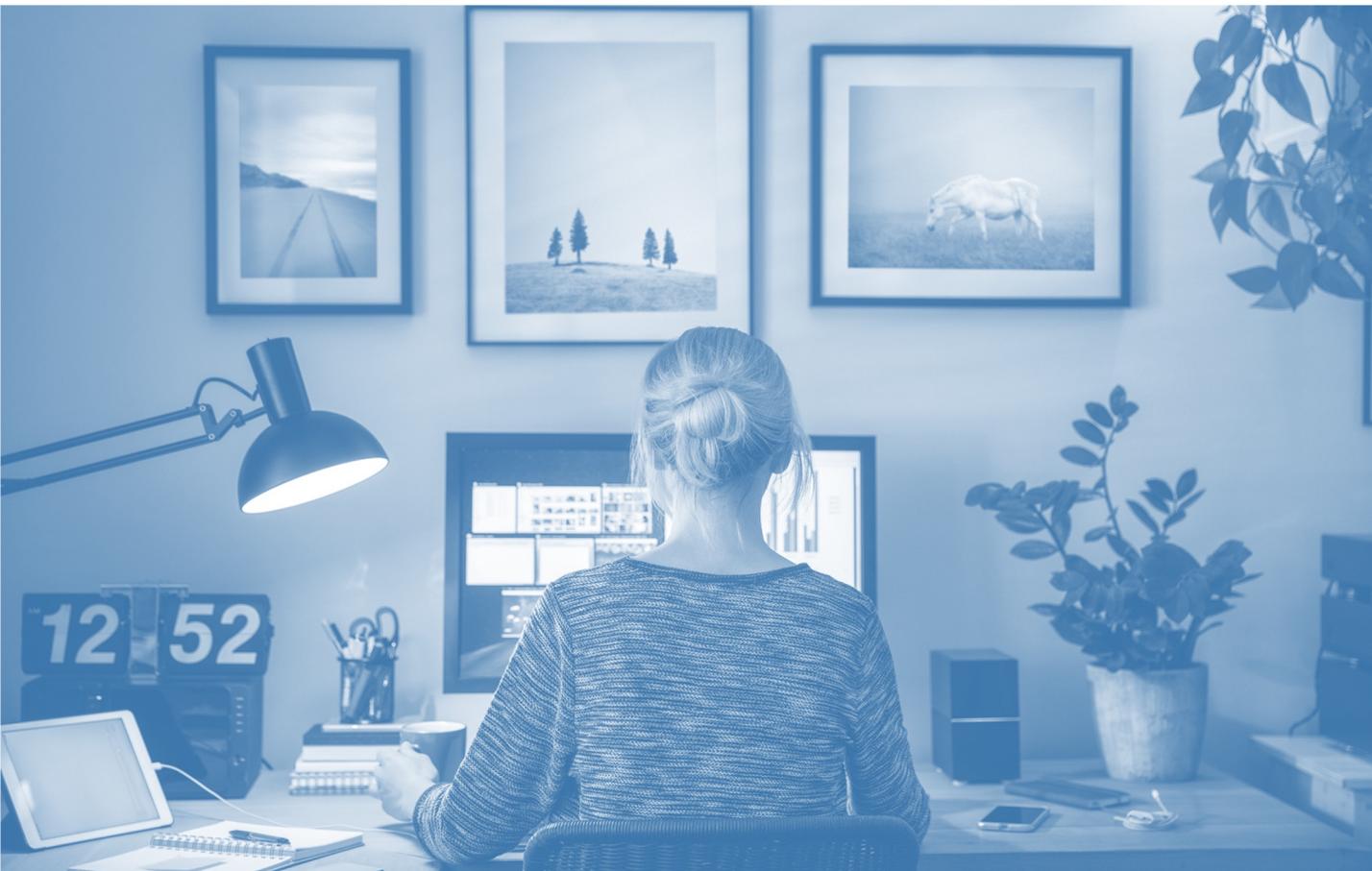


UNION DES ENTREPRISES  
LUXEMBOURGEOISES

2022 edition

# TAXATION: CROSS-BORDER TELEWORKING

## WHAT SHOULD I KEEP IN MIND AS AN EMPLOYER IN LUXEMBOURG?



This document summarises the various tax rules that apply to cross-border employees who telework (including in the context of the COVID-19 health crisis) as well as the resultant tax implications for employers. Its aim is to provide guidance to employers on the application of those rules and to help them to gain a better understanding of the obligations that might arise at their level.

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This document will be updated regularly to take account of any tax and social security changes.

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This document is intended merely for information purposes and does not purport claim to be exhaustive. The information contained in this document is general in nature and is not intended to address the specific situation of a particular individual or company. This information cannot and should not be used as the basis for decision-making without seeking the prior advice of a professional and without a detailed analysis of each situation.

# SUMMARY OF TAX RULES (outside COVID-19 period)

What will the implications be for you as an employer if you have cross-border employees who are teleworking, and how will they be taxed?

## In general

The salary of an employee (employed in Luxembourg) residing in one of the neighbouring countries, that they receive for days worked outside Luxembourg (and for example through teleworking), is in principle taxable only in the employee's country of residence (from the first day worked outside Luxembourg)\*. This rule does not apply below a certain number of days per year worked outside Luxembourg, referred to as tax "tolerance" thresholds.

In addition, Luxembourg employers must also be mindful of the possible tax implications of teleworking for them in a cross-border context:

- with regard to withholding tax: in some cases, Luxembourg employers might be responsible for collecting the tax due in the country of residence, in addition to the Luxembourg withholding tax;
- with regard to permanent establishments: in some cases, Luxembourg employers could be recognised as having a permanent establishment in the other country because of the teleworking of their employees.

## Taxation of employees

### *The "tolerance" thresholds*

The part of the salary of cross-border employees in respect of days worked outside Luxembourg is, in principle, taxable only in the country of residence of those employees, subject to the "tolerance" thresholds detailed below. As an exception, employees residing in Germany, Belgium or France who telework and/or travel for business purposes and/or are in professional training outside Luxembourg remain taxable solely in Luxembourg (subject to the provisions of double tax conventions), provided that they remain within the applicable annual tolerance threshold. This "tolerance" threshold varies between countries, as follows (at the current time):

- France: 29 days
- Belgium: 34 days
- Germany: 19 days

However, as soon as this threshold is exceeded, whether as a result of teleworking, travel for business purposes or professional training outside Luxembourg, the general rule will apply. It is to be noted that these thresholds are expected to be increased shortly (see our focus: towards an increase in tolerance thresholds).

It should be noted in this regard that the methods used to calculate these thresholds differ from one country to another and some points would require clarifications.

Lastly, rules and thresholds separate from those applicable with regard to taxation also need to be taken into consideration with regard to social security in order to determine the social security affiliation scheme applicable to cross-border employees.

## ***Methods for eliminating double taxation for employees***

For a cross-border employee, the salary taxable in Luxembourg may also be taken into account in order to calculate the tax due in the other neighbouring country (country of residence), under certain conditions.

For example, Germany uses the exemption with progression method. This means that a cross-border employee living in Germany teleworking and/or travelling for business purposes and/or in professional training for a maximum of 19 days per year outside Luxembourg would have to declare all of his/her salary in Germany, so that it can be taken into account in order to determine his/her global tax rate that might be used to tax his/her German-sourced income. A similar mechanism is applied in Belgium.

In France, double taxation is eliminated by applying a tax credit since the entry into force of the new double tax convention concluded with Luxembourg on 1 January 2020. Therefore, a cross-border employee residing in France who does not exceed the 29 days per year of teleworking and/or business travel and/or professional training outside Luxembourg would be taxed both in France and in Luxembourg on all of his/her salary, but would be entitled in France to a tax credit which should be equivalent to the French tax due. A transitional period is however applicable for the tax years 2020 and 2021, in respect of which cross-border employees can, upon request, benefit from the double taxation elimination rule applicable prior to the entry into force of the new tax treaty (i.e. the exemption with progression method) if that rule is more favourable for them given their personal tax situation.

## ***Social security***

Cross-border employees who perform/earn less than 25% of their working time/salary in their country of residence over a period of 12 months (for a Luxembourg employer) remain covered under the Luxembourg social security scheme.

When this threshold of 25% is exceeded the country of the employee's social security scheme changes. For a cross-border employee, the change of social security affiliation towards their country of residence usually generates a higher cost given that local contribution rates are higher. This is also the case for their Luxembourg employer, who will generally have to bear higher employer's social security contributions. In addition, this change in the country in which the employee is covered would result in the loss of the social benefits in the country where they were initially covered.

## ***Consequences for employers***

The employer must ensure an appropriate deduction of the tax withheld on wages, the correct assessment of payslips and of certificates of remuneration (especially in light of the automatic exchange of information or in the event of a wage tax audit) and fulfil any reporting obligations in its country of residence and any withholding tax obligations (see box below on reporting obligations in France).

In addition, Luxembourg employers must pay particular attention to any tax implications that teleworking in a cross-border context might have from a corporate tax perspective.

It is therefore essential for Luxembourg employers to monitor the number of days worked outside Luxembourg by their employees.





## Focus: towards an increase in “tolerance” thresholds

An increase in the tolerance thresholds applicable in each of the neighbouring countries is expected shortly, as follows:

- **Belgium:** The initial threshold of 24 days was recently increased to 34 days with effect from 2022 by means of an amendment to the double tax convention concluded between the two countries.
- **France:** The initial threshold of 29 days was recently renegotiated and increased to 34 days from 1 January 2023. This increase has been formalised through an amendment to the tax treaty between both countries, signed on 7 November 2022, which still needs to be ratified.
- **Germany:** The applicable threshold is 19 days but exchanges have been initiated between the authorities of the two countries with a view to possibly increasing this threshold (number of days to be confirmed).

It is to be noted that as regards social security, negotiations are underway with the neighbouring countries with a view to increasing the 25% threshold.



## Focus: reporting obligations in France for employers

### INTRODUCTION OF A SYSTEM OF DIRECT WITHHOLDING OF FRENCH PERSONAL TAX FROM THE EMPLOYEE’S PERSONAL BANK ACCOUNT (from 2023)

The French Budget Bill for 2023 proposes amending the reporting obligations of foreign employers in respect of an activity carried out in France by their French cross-border employees who remain covered under a foreign social security scheme (and therefore in Luxembourg).

It therefore provides for the removal of the obligation for foreign employers to levy the French withholding tax due if the tax “tolerance” threshold is exceeded. It will be replaced by a direct withholding of the French personal income tax (as estimated by the French tax authorities based on the income available at that time) from the employee’s personal bank account by the French tax authorities.

Foreign employers (and therefore Luxembourg employers) will nevertheless still be required, in this case, to report to the French tax authorities the amount of the annual salary of the employees concerned who are liable for tax in France, calculated according to the French tax rules.

## Corporate taxation

### *The possible recognition of a permanent establishment*

The situation of cross-border employees who are teleworking (and/or travelling for business purposes and/or in professional training outside Luxembourg) must be closely monitored by all Luxembourg employers. When a Luxembourg company carries out part of its activities in another country, it may be liable for corporate income tax in that other country, if the conditions regarding the recognition of a taxable presence in that other country (otherwise known as a “permanent establishment”) are met.

That will be the case if this activity has, inter alia, a degree of permanence. Therefore, a permanent establishment may generally be recognised on the grounds of the existence of a “fixed place of business” or because of the use of a “dependent agent”.

The current corporate tax rules (on the basis of the double tax conventions concluded with the neighbouring countries) are general and do not specifically cover the case of cross-border teleworking. Therefore, a case-by-case analysis should be carried out taking into consideration various cumulative criteria, as detailed below.

### *In which cases can teleworking lead to the recognition of a permanent establishment?*

To assess the permanent establishment risk, it is necessary to carry out a case-by-case analysis taking into consideration the following cumulative criteria:

- Frequency of the use of teleworking (i.e. occasionally or regularly),
- Contractual framework governing teleworking (i.e. optional or mandatory for the employee),
- The employee’s functions and responsibilities (e.g. administrative/support functions or management position, marketing role),
- Scope of the activities carried out by the employee working from home (e.g. activities limited to administrative tasks or regular professional activity, negotiating/concluding contracts on behalf of the company), and
- Material organisation of the teleworking (e.g. possible right of access of the employer, fixed/mobile equipment provided by the employer).

Among these criteria, it seems in practice that the voluntary/compulsory nature of telework and the type of functions performed are generally regarded as decisive in the analysis (however a case-by-case analysis on the basis of the foreign tax law is still necessary).

## ***Consequences of the recognition of a permanent establishment for the company***

In the event that the existence of a permanent establishment is characterised, its profits from the activity carried out in the other country will be subject to corporate income tax there, which may therefore result in an additional tax burden. In addition, the company must fulfil its tax reporting obligations in the other country, such as registration formalities and filing a tax return.

## ***What precautions should employers take?***

In order to anticipate and prevent the consequences relating to the recognition of a permanent establishment, in particular in the context of regular teleworking covering the majority of employees, employers must carry out a case-by-case analysis of the teleworking arrangements applying to their cross-border employees on the basis of the criteria set out above, and also monitor the number of days worked outside Luxembourg by the employees.

It is also recommended that the appropriate documentation to demonstrate the absence of a permanent establishment is prepared (on the basis of a set of factual indicators) in case of questions by foreign tax authorities.

## Practical case – The possible recognition of a permanent establishment



**Facts:** Anna is an office worker employed by a group having its registered office in Luxembourg.

For personal reasons, Anna teleworks on an occasional basis one day a week during which she handles administrative tasks or takes part in training.

The company's other employees do not telework or do so only occasionally.

Anna's company provides its employees with a number of recommendations on teleworking practices on its intranet.

### Analysis:

The company's teleworking arrangements are as follows:

- Anna and the company's other employees telework on an occasional basis,
- teleworking is optional for Anna and the other employees, whose reasons for requesting teleworking are unrelated to professional needs,
- Anna's employer has restricted the tasks authorised during teleworking to administrative tasks (excluding any decision-making on behalf of the company and customer marketing),
- the employer does not have a right of access to Anna's home or that of other employees teleworking.

Based on the above elements and insofar as (i) the teleworking is voluntary (for personal reasons), on an occasional basis, and (ii) the tasks performed are purely administrative, the risk of recognition of a permanent establishment in France should be limited in practice. However, a case-by-case analysis on the basis of French tax rules still needs to be carried out.

# SUMMARY OF THE RULES – SPECIFICITIES OF THE COVID-19 PERIOD

## Taxation

### *Taxation of employees*

The days teleworked during the period of the COVID-19 health crisis could be disregarded for the calculation of the tolerance thresholds, subject to certain conditions. Indeed, Luxembourg concluded agreements with each of the neighbouring countries in order to neutralise the days teleworked solely because of the COVID-19 health crisis (and to consider them, hypothetically, as days worked in Luxembourg). Those temporary agreements with the three neighbouring countries expired on 30 June 2022 (no renewal is currently planned). They applied only if the employees were teleworking for reasons of “force majeure” (or similar circumstances) related to COVID-19.

This means that an employee who was required, by their contract of employment, to telework on a mandatory and regular basis before the COVID-19 period could not benefit from the neutralisation rule with regard to the COVID-19 health crisis (with the resultant implications for the taxation of wages in Luxembourg and in the country of residence).

### *Corporate taxation*

During the COVID-19 health crisis, there was a broad consensus, on the basis of the recommendations on double tax conventions published by the OECD Secretariat\* at that time, that the temporary and exceptional change of the place of work of employees due to the COVID-19 crisis, in particular when working from home, was not, in principle, such as to lead to the creation of a permanent establishment for their employer. A case-by-case analysis was still needed.

\* It is to be noted that these OECD recommendations also covered (i) the substance and (ii) the change in tax residence of companies and natural persons.

## Social security

It should be noted that COVID-19 agreements also existed with regard to social security to neutralise the 25% threshold.

These agreements expired on 30 June 2022 (as did the tax agreements), but the members of the European Union’s Administrative Commission for the Coordination of Social Security Systems decided to establish a transitional period, running until 30 June 2023. During this transitional period, an administrative tolerance is applied at national level, enabling cross-border employees to continue to telework from home, without fear of having to change social security affiliation scheme if the 25% threshold provided for in European legislation is exceeded.

## Application of the “tolerance” thresholds in tax matters – Key dates



# FOCUS: END OF THE COVID-19 TAX AGREEMENTS

## How should the “tolerance” thresholds be applied in 2022?

2022 is a critical year for the application of the tax “tolerance” thresholds. Two types of tax agreements apply during this year: the COVID-19-specific tax agreements and the “tolerance” threshold tax agreements.

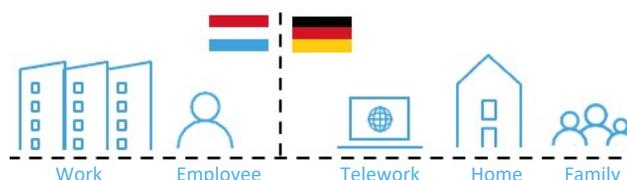
Thus, during the first half of 2022, the COVID-19 measures that neutralised the tax “tolerance” thresholds applicable for each of the neighbouring countries continued to apply (subject to certain conditions). Accordingly, cross-border employees who teleworked during this period solely for the purpose of combating the pandemic were able to benefit from the neutralisation of the tax tolerance thresholds as in previous years. From 1 July, the specific COVID-19 measures came to an end. Employees should therefore check whether or not they exceed the tax “tolerance” thresholds from that date. It is nevertheless necessary to carry out a case-by-case analysis to determine whether or not employees satisfied the conditions necessary to benefit from neutralisation under the COVID-19 measures and, if so, from which precise date these measures cease to apply for 2022.

It is to be noted that these thresholds do not have to be prorated for the period from 1 July to 31 December 2022.

## Practical cases for 2022

1

### Teleworking by a cross-border employee within the limit of the “tolerance” thresholds

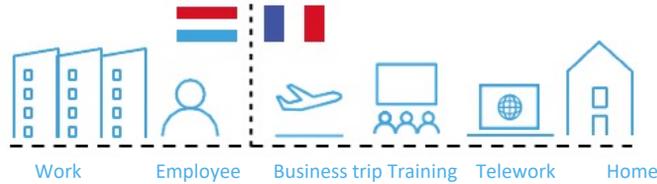


**Facts:** John works as an IT technician in Luxembourg, but lives with his family in Germany. During the first half of 2022, he teleworked full-time because of the pandemic. During the second half, in order to be able to take his children to school more often, he teleworked for 18 days. It should be noted that John has not travelled for business purposes or taken part in professional training in Germany, or in any other country other than Luxembourg. He wonders whether he should declare those teleworked days and be liable for tax on them in Germany.

**Result:** John teleworked during the first half of 2022 solely because of the pandemic. Those days are therefore neutralised for the calculation of the thresholds. During the second half, he worked less than 19 days in Germany. His salary will therefore be fully taxed in Luxembourg. However, he will still have to declare the full amount of his salary in Germany so that it can be taken into account in order to determine his global tax rate.

2

### Teleworking by a cross-border employee above the “tolerance” thresholds

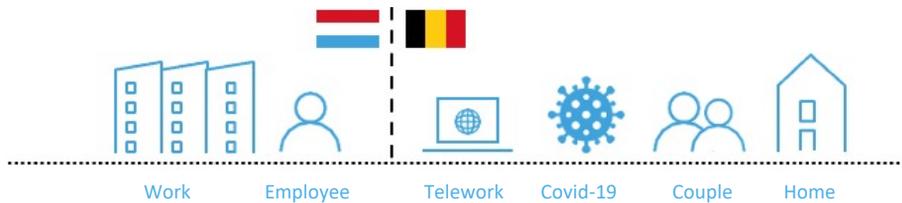


**Facts:** Paul works as an accountant in Luxembourg, but lives in France. During the first half of 2022, he teleworked full-time because of the pandemic. During the second half of 2022, Paul spent 10 days outside Luxembourg on business trips, and also teleworked for 10 days for personal reasons. He also spent 10 days in Ireland for professional training purposes. He wonders whether he should declare those 30 days outside Luxembourg and be liable for tax on them in France.

**Result:** Paul teleworked during the first half of 2022 solely because of the pandemic. Those days are therefore neutralised for the calculation of the thresholds. He nevertheless worked more than 29 days outside Luxembourg during the second half. His salary will therefore be taxed solely in France in respect of the 30 days worked outside Luxembourg (and tax exempt in Luxembourg) during the second half. The rest of his salary will be subject to ordinary tax rules.

3

### Teleworking by a cross-border employee outside the scope of the COVID-19 measures



**Facts:** Sarah works as an engineer in Luxembourg, but lives in Belgium. She is required by her employer to telework every Wednesday in order to optimise the use of its office space. Therefore, even before the start of the pandemic in 2020, she teleworked 47 days a year in accordance with her contract of employment. In 2022, she still has the same teleworking schedule (still at her employer’s request). She wonders whether she should declare those teleworked days and be liable for tax on them in Belgium.

**Result:** Sarah will not be eligible for the neutralisation of the days teleworked because of the pandemic for 2022 because her teleworking was not related to the pandemic. She will therefore exceed the “tolerance” threshold of 34 days per year for 2022. Her salary will therefore be taxed solely in Belgium in respect of the 47 days teleworked outside Luxembourg (and tax exempt in Luxembourg). The rest of her salary will be subject to ordinary tax rules.



## Supporting documents to be kept by the employer

- An up-to-date work schedule per employee detailing the place of work (i.e. days worked in Luxembourg, in the country of residence and in a third country)
- A certificate justifying which days were teleworked by employees due to COVID-19 and those not related to COVID-19
- All relevant supporting documents in the event of a Luxembourg or foreign wage tax audit, within the limits of the applicable legal framework and in accordance with regulations relating to privacy and the protection of personal data
- Any A1 certificate confirming the Luxembourg social security affiliation when your cross-border employees are teleworking (or travelling or in professional training outside Luxembourg)
- Any document that can be used to demonstrate the absence of a permanent establishment (on the basis of a set of factual indicators) if questions are raised by foreign tax authorities



## Important points to be checked by the employer

- Ensure the proper application of the COVID-19 specific measures and the common law provisions according to each specific case, in particular for the transitional year 2022
- Check whether an amendment to the contract of employment or to the internal rules and regulations must be made in order to cover the employee's teleworking (in particular for the Accident Insurance Association).
- Anticipate a possible overrun of the tax "tolerance" thresholds and the 25% social security threshold
- Ensure that the salary and related payslip are in line with the teleworking employee's tax situation
- Check whether you are subject to any specific obligations in terms of employment law when your employees are teleworking and the application of the teleworking agreement
- Check any tax reporting obligations in the country of residence of the employees
- Ensure that each employee complies in practice with guidelines issued, where applicable, by the company in order to limit the permanent establishment risk



## FOR MORE INFORMATION

### I. TAX

#### Luxembourg

- The Luxembourg Direct Tax Authorities (in particular Guidance with regard to the agreements with Belgium/France/Germany concerning the “tolerance” threshold)
- Guichet.lu on teleworking

#### For the general rules

- Germany: The double tax convention, the mutual agreement, the circular and the Luxembourg administrative guidance
- Belgium: The double tax convention, the amendment of 2019, the amendment of 2022, the circular – instructions of the Belgian Ministry of Finance and the Luxembourg administrative guidance
- France: The double tax convention and its protocol, the amendment, the circular and the Luxembourg administrative guidance

#### For the COVID-19 specific rules

- Germany: The mutual agreement and the circular
- Belgium: The mutual agreement and the circular
- France: The mutual agreement and the circular

The OECD recommendations on the permanent establishment risk posed by teleworking

#### France

- <https://www.impots.gouv.fr/actualite/amenagement-du-prelevement-la-source-pour-certains-employeurs-etablis-hors-de-france-0>
- <https://www.impots.gouv.fr/actualite/amenagement-du-prelevement-la-source-pour-certains-employeurs-etablis-hors-de-france-1>

### II. SOCIAL SECURITY

- The Ministry of Social Security
- General rules relating to social security: Regulation (EC) No. 883/2004
- Extension of the agreement on social security insurance until 30 June 2023
- Recent changes regarding the “tolerance” threshold: Parliamentary question 6763



## Survey on teleworking practices

UEL, with the support of the Chambre de Commerce and the Chambre des Métiers, and in collaboration with its members, has published the results of its survey on telework practices by Luxembourg employers.

[Click here to discover them!](#)