

Conference organized by the
Institute for Austrian and International Tax Law, Vienna

Mobility of Work

RUST CONFERENCE 2022 Questionnaire

GUIDELINES

Mobility of Work

Covid-19 has had a major impact on our lives. Although most of us are happy about returning or have already returned to “normality” (=our behaviour and way of living before Covid-19), some changes will remain. We have learned to work from home or other places, and many experts predict that the degree of mobility of work after Covid-19 will be much higher than before. This has impact on the application of tax rules, in particular with regard to cross-border relations. Our research project will analyse which new interpretation problems have arisen due to new situations, and whether the existing rules still make sense or should be changed. Cross-border relations within the context of COVID will be the focus of the research. Most likely, after COVID, there will be a higher degree of mobility of work which will be voluntary. Whereas, during the pandemic, many people were forced to work at specific places. The study will also analyse whether it makes a difference to the application of the existing tax rules if one is forced to stay and work from a specific location or in a specific country, or whether one is doing so on a voluntary basis.

Authors are invited to report about administrative practice and case law as well as mutual agreements concluded by the competent authorities in their country in respect of the issues presented below. However, they should also feel free to comment critically on the positions taken by the tax administration and courts in their country. Special emphasis should also be put on the question of how the administration enforces the “old” pre-Covid rules in a changing environment and how new rules could be enforced. The reports should follow the structure below and contain the eight chapters outlined in this questionnaire. The questions raised here, however, should be used as inspiration only for authors on the issues to be discussed.

Authors should feel free to discuss issues other than those specifically referred to here if relevant to any of the eight chapters and their country’s experience.

The reports should be readable independent of the questionnaire.

1. Mobility of Work and Domestic Tax Law

- What is the influence of a higher degree of mobility of work for residence-based taxation of individuals in your country? Is it more or less likely that worldwide taxation is triggered depending on the amount of time spent in your country as the state of residence or work place? What are the thresholds decisive for worldwide taxation in your country in these cases? Does it make a difference whether one is forced to spend more or less time in your country (due to travel restrictions or limitations for use of office etc.)? Do the existing criteria still make sense or should they be reconsidered?

- If a person works and therefore stays in another country for a longer period, is there a risk that an exit tax is triggered in your country? Does it make a difference whether the stay abroad is voluntary or imposed by travel restrictions etc. such as those that have been in place during the Covid-19 period)?
- If the management board members of a corporation live and work in different countries, what might be the impact for the residence of the corporation? What are the legal consequences for the residence of the corporation if the board members change their residence from your country to one or more other countries, or vice versa? Might exit tax be triggered for the corporation?
- If all employees work from home and the company no longer has (sufficient) workplaces, does the company meet the substance requirements? What are the legal consequences if these requirements are no longer met?
- If a person works from home in your country for a foreign corporation: Under your country's domestic tax law, could his or her home constitute a permanent establishment and therefore trigger taxation for the corporation? And if so, under which requirements?
- Are current substance requirements based upon premises still appropriate in the context of increased mobile work patterns?
- Although this project covers, in particular, personal and corporate income taxes, if your country has a social security system: Is the treatment under social security law aligned with the tax residence nexus in your country?

2. Residence, Tie Breaker Rules and Mobility of Work: Individuals and Entities (Art 4 par 1 OECD MC, Art 4 par 2 OECD MC, Art 4 par 3 OECD MC, Art 8 OECD MC, Art 16 OECD MC etc.)

- What is the impact of a higher degree of mobility of work for treaty residence under provisions as Art 4 par 1 OECD MC? Are any differences dependent on whether one is forced to spend more time in your or another country (e.g. due to travel restrictions during a pandemic) or is this voluntary?
- If all employees work from home and the corporation no longer has (sufficient) workplaces, does the corporation meet the substance requirements? Or is there a risk the corporation loses treaty entitlement?
- How does the tie-breaker clause of Art 4 par 2 OECD MC operate in situations of dual residence due to increased mobility of work? Have special interpretation issues arisen? Does it make a difference whether or not the stay in a certain country is on a voluntary basis?

- How does a highly mobile lifestyle impact the criteria laid down in Art 4(2)? Will there be any consequences for terms such as “permanent home”, “center of vital interests” or “habitual abode”?
- In case the board members of a corporation decide to move to another country or to your country and work from there: How does the tie-breaker clause of Art 4 par 3 OECD MC operate? Any special interpretation issues? Please take also the pre-2017 version of Art 4 par 3 into consideration.
- What is the impact of problems that might have arisen in the context of Art 4 par 3 OECD MC on distributive rules like Articles 8 or 16 if the corporation moves to a different residence state? Any practical problems that have arisen?
- Are there tax consequences for the corporation itself if board members exercise their activities in a state different from the residence state of the corporation?
- How, in practice, are countries able to track residence? For example, what happens when an individual splits their time between mobile work and remaining in their home country?

3. Permanent Establishments (Art 5 OECD MC) and Mobility of Work

- If an individual works from home, not only temporarily, the home office may be considered to have a certain degree of permanence: Under what circumstances does the home office constitute a fixed place of business PE for tax treaty purposes? Under what circumstances might the home office of an employee of a foreign enterprise in your country lead to a dependent agent under Art 5 par 5 OECD MC? In what circumstances is an office “at the disposal” of an enterprise?
- In what circumstances can a self-employed person trigger a dependent agent PE?
- Digital nomads: How are the activities of digital nomads (working from a flex office rather than a home office) affected by the pandemic? Can a flex office constitute a PE (e.g. regarding the fixed place of business criterion)?
- Both the OECD Commentary and the UN Model Convention contain rules for a service PE: Under which circumstances might home office in your country constitute such a PE for tax treaty purposes? And how are the 183 days calculated?
- In all these situations: If the home office constitutes a PE for tax treaty purposes according to case law or administrative practice in your country, how is the profit determined which is attributed to this PE?
- And also in all these situations: Does it make a difference whether home office is imposed or recommended by government in line with public health measures?
- What are the consequences for the constitution of PEs if the COVID situation continues for a longer period?

- Art 5 par 3 OECD-MC: What effect does the mobility of work have on the 12-month period? What happens, for example, if supervisory activities are exercised outside of the state where the construction site is located? How does mobility of work affect geographical and economic coherence of the construction project?
- How does the discussion on the mobility of work affect the discussion on the future of the PE-concept?

4. Physical Presence According to Art 15 par 1 and 17 OECD MC

- Art 15 par 1 OECD MC allocates taxation rights exclusively to the state of Residence, unless the employment is exercised in the other contracting state: In the case of home office, is the activity always exercised in the state where the home office is located? Under which circumstances? Is the connecting factor for taxing employment income under your domestic law broader than the definition used under Art 15 OECD MC?
- Does it make a difference if the home office is imposed by government measures (e.g. Covid-19 prevention measures)?
- In case employment is exercised partly or totally in a home office in the State of Residence (or in the other state): Where is a severance payment taxed, and under which rule?
- Are “stranded workers” who, due to travel restrictions, are prevented from returning to their state of Residence or to the state where they usually exercise their employment taxed in the state where they are physically present?
- How are employees treated who cannot exercise their employment and, due to travel restrictions or public health measures, have to stay in their state of Residence (without being able to work in a home office, e.g. because they usually work in a factory), and still receive their salary either from their employer or from the state?
- Where are artists and athletes under Art 17 OECD MC taxed if they rehearse or train in one state and perform publicly in another state?
- How are the taxation rights allocated between the two contracting States if the artist or athlete is supposed to perform his or her activities in the other contracting state but, due to travel restrictions and public health measures, is prevented from doing so and still receives remuneration either under contract or from government funds?
- What are the consequences for the taxation of employees and artists/athletes if the COVID-situation continues for a longer period?
- What are the consequences if performances of the artists/athletes are live-streamed?

- Pandemic-related restrictions (e.g. on travel) also concerned influencers who are covered by Art. 17 OECD-MC. Is the taxation of these influencers affected in any way? If yes, in what way how?

5. Art 15 par 2 and par 3 OECD MC

- How are home office days in the state of Residence counted for the purpose of the 183-days rule in Art 15 par 2 OECD MC?
- Does an employer (corporation) which has lost its substance (premises) because all employees are working from home qualify under Art 15 par 2 subpar b OECD MC (“not a resident of ...”)?
- What are the effects of a change of residence state of the employer due to the fact that the board members are working from home, for the purpose of Art 15 par 2 subpar b OECD MC?
- Can the home office of the employee constitute a PE of the employer according to Art 15 par 2 subpar c OECD MC, by which the remuneration of the employee is borne? Under which circumstances?
- In all these situations: Does it make a difference whether the home office is imposed or recommended by the government in line with public health measures?
- Art 15 par 3 OECD MC follows a different concept for employees working in international traffic: Does Art 15 par 3 OECD MC provide for rules which could be discussed as an alternative to Art 15 par 1 and 2 OECD MC?
- In which way could Art 15 OECD MC be improved?
- What are the impacts of economic ownership on Art 15 par 2 OECD MC?

6. Frontier Worker Rules in Bilateral Tax Treaties

- Contrary to the OECD Model Convention, many bilateral tax treaties contain specific rules for the taxation of frontier workers. Often the application of these rules requires daily return to the State of Residence (with some exceptions): How do these rules operate for employees working from a home office?
- Those rules often require the employer to be a resident of the other contracting state: Any practical problems arisen either due to a change of residence state of the employer or board members who are more mobile?
- Does it make a difference whether the home office is imposed or recommended by the government due to public health measures?

- Do the frontier worker rules still make sense in times of increased mobility of workers?
- What about subsidies related to COVID (Cfr. Chapter 4. Concerns related to cross border workers of the OECD Secretariat analysis of tax treaties and the impact of the COVID-19 crisis) and non-COVID measures in future implementation following greater mobility of work? How have these been classified? How could they otherwise be classified considering current and past practice with regards to frontier workers (Cfr. 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, INTERTAX, Volume 48, Issue 8 & 9)? Have there been differences in treatment with regards to other types of cross-border workers?

7. Mobility of Work and the Justification and Legal Basis of Covid-Based Rules (Consultations or Mutual Agreements)

- During the pandemic, for tax treaty purposes, some governments deemed that employees, although working from a home office in the State of residence, were still exercising their activities in their previous state of activity: Is there a legal basis for this?
- Some governments also assumed that through the home office no permanent establishment was constituted, except for the time period of the pandemic: Is there a legal basis for this?
- Has the tax administration of your country taken such views? In which areas? What was the legal basis for this?
- More generally: Is it a relevant criterion for the application of tax treaty law whether a taxpayer decided voluntarily to work in a certain country or was forced to make such a decision by travel restrictions or public health measures? Is force majeure relevant in the application of tax treaties?
- Does it make a difference if a government does not unilaterally make such assumptions but concludes a mutual agreement or a consultation agreement with other tax treaty partners?
- Has the government of your country concluded such agreements with other governments? Which questions have been dealt with by such agreements? Was there a legal basis for this?

8. Future of Mobility of Work: Need for Adjusting the Existing Treaty Rules?

- Do the existing tax treaty rules still make sense in an environment of increased mobility of work?
- Which tax treaty rules should be changed? Is there a discussion in your country? Has your country already adopted its tax treaty policy due to such deliberations? What are your views?
- Take a look in particular at Art 4 and Art 15 OECD MC!
- Does the recent development in technologies and auditing capabilities enable the implementation of an efficient system of apportionment of income according to the effective presence within a jurisdiction?
- Is there a need to specify through an amendment to the OECD MC (UN MC) new definitions to ensure a harmonized application of the OECD MC (UN MC) (e.g. employment and employer)?
- Does increasing mobile work conceptually change the way that tax Authorities approach the value creation process? For example, if value is created by a group of mobile individuals based in different jurisdictions and working virtually, how will this affect both personal and corporate tax? Will this raise an issue for the attribution of income and if so, as seems likely, will we see an increased use of the profit split method or even formulary apportionment?

Paper length: 20 pages, Times New Roman 12 pt.

Format: preferably Microsoft Word

Bibliographic references (footnotes) and quotations: Follow the IBFD guidelines, for download at <https://www.ibfd.org/authors-contributors/books>

The questionnaire does not necessarily have to be followed question by question (e.g. when there is nothing to report from your jurisdiction). Rather, it should serve as a stimulus for your thinking process about the various topics that are outlined.

Deadline for delivery of the paper: May 15, 2022

Provide a brief biographical statement (3-5 lines) for the List of Contributors in the book by the deadline mentioned above. Ensure that graphics and charts in the final version are either black and white or greyscale only (No colour graphics are allowed in the book!), and email them as separate files in xlsx, docx, pptx, jpg or tif format. The resolution of images must be at least 300 DPI to ensure good quality for printing.

The national reports (papers) will be made available for download on a password-protected conference website so that the conference participants can be well prepared for the discussions.

On the basis of the national reports, we will identify the most relevant topics and select speakers who will present selected issues in a three-minute input statement to stimulate public debate and discussion.

After the conference, there will be a short period of time granted for authors to include the findings of the conference in their respective papers. We will organize linguistic editing of the final reports.

If you have any questions or concerns, do not hesitate to contact Ms Nina Nimmerrichter and Ms Hedwig Pfanner via taxlawconference@wu.ac.at.