

# The international tax implications for cross-border workers during COVID-19

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## Background

To combat the COVID-19 crisis and mitigate the impact on business and employees, exceptional measures have been implemented by the Belgian and other governments. Some of these measures, like home-teleworking, have a direct taxation impact for many employees who are in principle traveling for international companies – the so called “cross-border workers”. They are now prohibited from traveling and forced to spend their working days in their State of residence and to perform full time ‘telework’ from their home office.

The fact that these cross-border workers must now spend working days at home that, under normal circumstances, would have been (fully or partially) spent in another country, can potentially result in **various unforeseen and extremely burdensome tax implications** for companies and employees, both from an administrative and a financial / cost perspective.

In application of the general rules of the “employment income article” of double tax treaties (Article 15 of the OECD's Model Tax Convention), which attribute taxing rights between countries in a cross-border context, the **physical presence of cross-border workers** – in their State of residence and in the State of employment – is generally the basis for the international allocation of taxation rights between the two contracting States involved. In other words, taxation of employment income in the work State can only occur if the employee is actually and physically performing his or her activities in that State.

Taxation in the work State will generally be triggered either when the employee exercises his or her professional activities abroad (in the work State) for more than 183 days, when the remuneration is paid by an employer in the work State or the cost of the remuneration for the activities performed abroad is simply borne by a foreign employer (in the work State) or a foreign permanent establishment (in the work State).

If now, due to COVID-19, the employment is not exercised physically in the work State (for example, in The Netherlands), but from home (for example, in Belgium), this income will in principle become subject to home country income taxes (i.e. Belgium) and no longer in the State where the employment should have been exercised in the absence of the COVID-19 crisis (i.e. The Netherlands).

## Position paper drafted by AmCham Belgium's Employee Tax Subcommittee

In order to avoid uncertainty and extra costs for employees and employers working normally in an international environment, AmCham Belgium's Employee Tax Subcommittee recently drafted a position paper on this topic.

**The COVID-19 pandemic and its consequences qualify as a situation of “force majeure”**. Therefore, a flexible interpretation of the rules of international taxation is required.

Standard rules are made for standard situations. When these standard rules are applied to situations of cross-border employment which are now exceptionally and heavily impacted by the coronavirus crisis, this will lead to unwanted and burdensome tax and financial consequences, both for employers and employees.

## **AmCham Belgium’s recommendation: General “force majeure” interpretation in the application of Article 15 of the [OECD’s Model Tax Convention \(MTC\)](#) during the COVID-19 crisis**

For employees who are now working from home (due to COVID-19 measures), a **force majeure interpretation would mean** that the **“normal working pattern”** (with working days spent abroad) **is not interrupted by the COVID-19 crisis**. Consequently, the working days that cross-border employees are now spending at home (and that would have been working days abroad) should be counted as days performed in the ‘habitual place of work’, notably in the work State, where the cross-border worker would have physically performed his or her employment activities, in a normal, non-COVID-19 employment situation.

In application of the force majeure interpretation (for example, in the double tax treaties with Belgium’s neighboring countries), a **legal fiction** would need to be applied where these “home working days” would be “deemed to have been spent abroad”, notably in the regular work State, taking into account their normal working pattern from before the COVID-19 measures, so either fully or partially allocated to the work State. In this approach, the impact of the COVID-19 measures on cross-border employment, notably the temporary increase of **teleworking can be ‘neutralized’, and the pandemic will have no (further) impact on the tax position of the concerned employees**. This will avoid a significant additional administrative burden for Belgian companies in terms of payroll obligations and other related formalities. Moreover, it will work to reassure and provide certainty towards employers and their cross-border employees in the current turmoil of events.

The general force majeure interpretation advocated for, regarding the taxation in the work State, is also supported by the OECD. **On April 3, 2020, the OECD Secretariat [issued its recommendations](#) on implications of the COVID-19 crisis on cross-border workers**. In this OECD guidance, it is stated that *“exceptional circumstances call for an exceptional level of coordination between countries to mitigate the compliance and administrative costs for employees and employers associated with involuntary and temporary change of the place where employment is performed.”* In this respect, the OECD encourages countries to alleviate the unplanned tax implications and potential new burdens arising due to the effects of the COVID-19 crisis.

In order to avoid **various unforeseen and extremely burdensome tax implications**, additional administrative burdens, **increased employment costs** and complexity, and in order to have a **uniform approach** between all countries impacted by the COVID-19 crisis, **AmCham Belgium recommends the application of a general “force majeure” interpretation during the COVID-19 crisis (= deemed to have been spent in the contracting State where the cross-border worker would usually have exercised the employment)** to Article 15 (employment income) of the OECD MTC in the double tax treaties concluded by Belgium.

Our position paper has been sent to the Cabinet of the Minister of Finance and other important policymakers on April 23, 2020 (see [position paper](#) for more details).

### **Several agreements reached between Belgium and neighboring countries**

In the meantime, on the basis of discussions between Belgium and neighboring countries (The Netherlands, Germany, France and Luxembourg), several agreements have been reached in which the principle of the **“force majeure” has been accepted**. This means that days spent working from home due to COVID-19 pandemic measures will be deemed to have been spent in the State where the employee would have carried out the work without the COVID-19 measures.

The mutual agreements are applicable to working days during the period between March 11 and May 31, 2020 and are automatically extended in principle until at least June 30, 2020.

These agreements are in line with the recommendations made by AmCham Belgium under the leadership of its Employee Tax Subcommittee and its motivated volunteers. This is an excellent example of how AmCham Belgium is supporting its member community during the COVID-19 crisis and beyond. Thank you to all members of the Employee Tax Subcommittee for their continuous and valuable work!

**About the Employee Tax Subcommittee:**

The Employee Tax Subcommittee – an initiative of our Legal & Taxation Committee – focuses on personal taxes and social security issues which are related to international employment and drafts recommendations through position papers to advocate with Belgian government officials and political decision-makers. Contact Marcel Claes ([mclaes@amcham.be](mailto:mclaes@amcham.be)) if you'd like to get involved.

**About the author :**

An De Reymaeker is an International Tax Lawyer and Partner at the law firm Vandendijk & Partners. She is specialized in personal taxation in an international context. She has been Chair of the Employee Tax Subcommittee since December 2017 and, since last year, she is also a Vice-Chair of AmCham Belgium's Legal & Taxation Committee ([an.dereymaeker@vandendijk-taxlaw.be](mailto:an.dereymaeker@vandendijk-taxlaw.be))