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FINAL REPORT BY THE EXPERT

Advice case title: Employee in another EU country primarily in home office

Full official name of the advised entity: EUREGIO Salzburg - Berchtesgadener Land Traunstein

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I. Executive Summary

We have been asked to assess the legal obstacles existing with particular regard to cross-border employment contracts between Austria and Germany, but with a focus also generally on cross-border situation between EU Member States, with particular regard to situations, in which the worker carries out his/her activities in home office.

In the following, we will describe the existing obstacles in the area of social security systems, tax law and labour law. As we will show, under the current international legal framework, the tendencies in social security law, tax law and labour law are not uniform and, depending on the different perspective (social security, tax, labour), the same employment contract may be simultaneously subject to different legislations. In addition, in each area it is not always clear which national legislation applies. There are therefore uncertainties that employers can hardly govern (whilst they have an intrinsic need to apply a uniform and clear set of rules) that risk, which may lead them to refrain generally from granting home office abroad to their employees.
The main part of the obstacles in the area of social security and tax law is constituted by (i) a time element, i.e. a maximum period during which the activity can be carried out in home office abroad, in connection with (ii) a geographical element, i.e. the fact that the home-office is located in another country than the country where the employer has its registered office/place of business or, in those cases in which, bilaterally, certain member States, such as Germany and Austria, have adopted a definition of an area which is to be intended as close to the border such as to apply specific rules for "cross-border situations", such definitions may be too limited for practical needs, although, as we will show, very recent developments have eliminated the geographical limitation. In the area of applicable law, the main obstacle lies in the limitations to the parties' freedom to choose the applicable law, since the chosen law cannot overrule mandatory and/or overriding mandatory provisions of the law which would apply without a choice (usually the place of residence of the employee, in case of home office) or of the forum state (legal system of the state in which the courts having jurisdiction over the employment contract are located), which lead either to a high degree of uncertainty or to the application of a legal system with which the employer is not familiar.

II. <u>Description of the obstacle with indication of the legal/administrative provisions causing the obstacle</u>

The Applicant has submitted the following problem: "*There are currently good regulations for cross-border employment within the EU, especially in regards to social security, tax and labor law. These regulations assume that an employee normally physically crosses an internal EU border to reach the place of work. With the advent of wide-spread home office work, those employees who are allowed to work from home, regardless of how close that home is to the border, enter a legal grey area. In our specific case, the German-Austrian bilateral agreement on cross-border employment ("Grenzgängerregelung") is not applicable when the employee works more than 45 days per year at home. The contractual complications and risks are so great that no other company we know of has dared to hire in this way. Instead they require their foreign employees to work physically in the companies' offices, even when most other employees are allowed, encouraged or required to work from home.*"

In more general terms, the obstacles to be analysed concern cases in which an employer with registered offices/place of business in one EU Member State (in our case: in Germany) employs an employee with personal residence in domicile in another EU Member State (in our case: in Austria) with the understanding or rather the desire, that the employee is to perform his/her contractual duties mainly from home and not on the employer's premises.

In legal terms, the obstacle, as described by the Applicant con be broken down into:

(a) rules for **social security contributions**, which can become an obstacle to cross-border employment if the employer is forced to apply the social security rules (and deal with the institutions) of a country with which it is not familiar (see *infra* point II.a),

(b) rules for **taxation**, which impact on both the employee and the employer, can become an obstacle to cross-border employment if the employer is forced to apply the taxations rules (and deal with the institutions) of a country with which it is not familiar (see *infra* point II.b) and

(c) rules determining the **legal framework applicable to the labour contract**, which can become an obstacle to cross-border employment if the employer is forced to apply legal rules of labour law of a country with which it is not familiar (see *infra* point II.c).

The underlying principle is that these rules are primarily designed for a "work reality" where contractual duties are generally performed at the company's premises and only exceptionally in other places, whereas in the last years it has become increasingly common (and normal) to perform the contractual duties predominantly from the employee's residence in home office.

In particular:

a. Social security contributions

In the area of social security contributions, the main rules applicable to cross border situations are laid down in Reg. 883/2004[1] on the coordination of social security systems.

Art. 11 of Reg. 883/2004 as subsequently amended[2] sets forth the general

[1] REGULATION (EC) No 883/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the coordination of social security systems, published in OJ L166, 30.04.2004, p. 1 - 117

[2] Art. 11 of Reg. 883/2004

1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

2. For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

(b) a civil servant shall be subject to the legislation of the Member State to which the administration employing him is subject;

(c) a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State;

principle of applicability of the **rules of only one Member State** for all contributions and **territoriality principle according to which the worker is subject to the social security legislation of the State where he carries out his activity, regardless of his residence**.

As a partial exception to the strict application of the principle of territoriality, **Art. 13 of Reg. 883/2004**[3] contains specific rules applicable to persons who pursue their activity in more than one Member State, with the specification that in such cases the laws of the Member States apply in which the person carries out a substantial part of the activity, defined as "*more than 25%*".

Application of these principles to a situation in which the worker carries out his activity from his home place in another country than the place of business of the employer leads therefore, as a general rule, to application of the social security system of the person's home country instead of the social security legislation of the employer's country and hence to the **employer's obligation to apply and "deal with" unknown, foreign social security systems**, as specifically provided for by Art. 21, 1st par. of Reg. 987/2009[4] laying down the procedure for implementing Reg. 883/2004

(d) a person called up or recalled for service in the armed forces or for civilian service in a Member State shall be subject to the legislation of that Member State;
(e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.
4. For the purposes of this Title, an activity as an employed or self-employed person normally pursued on board a vessel at sea flying the flag of a Member State shall be deemed to be an activity pursued in the said Member State. However, a person employed on board a vessel flying the flag of a Member State and remunerated for such activity by an undertaking or a person whose registered office or place of business is in another Member State shall be subject to the legislation of the latter Member State if he resides in that State. The undertaking or person paying the remuneration shall be considered as the employer for the purposes of the said legislation.
5. An activity as a flight crew or cabin crew member performing air passenger or freight services shall be deemed to be an activity pursued in the Member State where the home base, as defined in Annex III to Regulation (EEC) No 3922/91, is located.

[3] Art. 13 of Reg. 883/2004
1. A person who normally pursues an activity as an employed person in two or more Member States shall be subject:
(a) to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State; or
(b) if he/she does not pursue a substantial part of his/her activity in the Member State of residence:
(i) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated if he/she is employed by one undertaking or employer; or
(ii) to the legislation of the Member State in which the registered office or place of business of the undertakings or employers is situated if he/she is employed by two or more undertakings or employers which have their registered office or place of business in only one Member State; or
(iii) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated other than the Member State of residence if he/she is employed by two or more undertakings or employers, which have their registered office or place of business in two Member States, one of which is the Member State of residence; or
(iv) to the legislation of the Member State of residence if he/she is employed by two or more undertakings or employers, at least two of which have their registered office or place of business in different Member States other than the Member State of residence.
(*omissis*)

[4] REGULATION (EC) No 987/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p. 1 – 42: 1. An employer who has his registered

on the coordination of social security systems. In addition, in some cases there remain **uncertainties as to which is the right social security system to apply**.

Exceptions to the general rule are allowed under Art. 16 of Reg. 883/2004[5] which allows for general agreements (agreements for groups of workers and multilateral agreements) and specific decisions (agreements for individual workers) in exemption from the general rules as outlined above. In particular, **Germany and Austria have entered into, with effect as of January 1st, 2023, a Framework agreement** on the application of Article 16 (1) of Regulation (EC) No. 883/2004 in cases of habitual cross-border telework, whereby the threshold for definition of a "substantial" part of the activity has been raised to 40%, with the effect that the worker is allowed to carry out his/her activities up to a maximum of 40% from home without applicability of the social security systems of his/her home country; in other words, in cross-border cases between Germany and Austria, employers can apply the social security system of their own country to any and all of their employees, even if employed in home office from abroad, as long as the activity in home office does not exceed 40% of the total working days.

In addition to that bilateral agreement on cross-border telework, with effect as of July 1st, 2023, a **multilateral European agreement** signed by 17 EU Countries (including Germany and Austria) has entered into force, which, basically, raises the threshold to 50% of total working days.

This multilateral framework agreement facilitates between the signatory States the conclusion of individual derogations in the interest of a category of employed teleworkers and their employer(s), provided that certain conditions are met. The derogation allows workers to request that the social security legislation of the State where the employer has its registered office/place of business, instead of the law of their own State of residence that would otherwise be applicable as a result of habitual cross-border telework (by virtue of art. 13.1.a, Reg. 883/2004).

A request may be submitted for the employee to be subject to the social security legislation of the State of registered office or place of business of his employer in case that:

(i) His/her State of residence is other than the State of registered office or place of business of the employer, and

office or place of business outside the competent Member State shall fulfil all the obligations laid down by the legislation applicable to his employees, notably the obligation to pay the contributions provided for by that legislation, as if he had his registered office or place of business in the competent Member State.

2. An employer who does not have a place of business in the Member State whose legislation is applicable, and the employee may agree that the latter may fulfil the employer's obligations on its behalf as regards the payment of contributions without prejudice to the employer's underlying obligations. The employer shall send notice of such an arrangement to the competent institution of that Member State.

[5] Art. 16 of Reg. 883/2004
1. Two or more Member States, the competent authorities of these Member States or the bodies designated by these authorities may by common agreement provide for exceptions to Articles 11 to 15 in the interest of certain persons or categories of persons.
(*omissis*)

(ii) His/her cross-border telework in the State of residence is less than 50% of the total working time, and
(iii) the request is made in consent between employer and employee.

The exemption may be applied for a maximum of 3 years at a time, with extensions possible upon a new request. It has to be noted that the framework agreement regulates “cross-border telework” situations but does not require any “border situation" (meaning that it is not required that the place of home-working of the employee and the place of business of the employer are located in neighbouring countries).

This multilateral framework agreement draws from the experience of the Covid-19 Pandemic, as an effect of which cross-border telework has widely spread and will remain a common way of working for many people. In that period the Administrative Commission for the Coordination of Social Security Systems adopted a Guidance on the legislation applicable to telework, recommending that telework in a Member State other than the competent (“usual”) Member State of employment, due to COVID-19, should not lead to a change of applicable legislation; such a rule remained in force for a transition period until June 30, 2023; a new Guidance Note on telework is now applicable from 1 July 2023[6].

Another exception is the case of company secondments: in these cases, the applicable law remains the same as was applied before the secondment (art. 12) (but secondment is not comparable to home working).

b. Taxation

If an employee performs his/her work to a small extent in a home office in another country than the registered office/place of business of the employer, this usually has no tax implications. But if the remote working abroad is performed on a regular basis, this can lead to tax consequences for both the employee and the employer.

Most States apply the principles of worldwide taxation for its own tax residents and a source-based taxation for income generated on its own territory. Application of both principles on a situation where a tax resident[7] in one State carries out his activities as employed person in another State (or for a business entity with registered offices in another State leads to **potential double taxation and/or uncertainties as to where (in which country) the worker’s income is taxable**. In order to avoid such double taxation states have adopted the means of bilateral agreements to avoid double taxation, usually on the basis of the OECD Model convention which contains criteria to determine the (sole) State with the right to tax a certain activity.

In the case of employment contracts, Article 15, par. 1 of the OECD Model

[6] Administrative Commission for the Coordination of Social Security Systems, Guidance note on telework applicable from 1 July 2023, Note of 21 June 2023 (AC 137/23), https://ec.europa.eu/social/main.jsp?catId=868&langId=en;.
[7] Article 4 of the OECD Model Convention against double taxation defines a 'resident in a Contracting State' any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature.

provides for the exclusive taxation of employment income in the worker's State of residence, unless such employment is carried out in the other Contracting State, in which case the income must be subject to concurrent/double taxation in both countries. As stated in paragraph 1 of the Commentary to Article 15 of the OECD Model, "*Paragraph 1 establishes the general rule for the taxation of employment income, namely, that such income is taxable in the State where the employment is actually exercised.* [...] *Employment is exercised at the place where the employee is physically present when he/she performs the activities for which the employment income is paid*"[8].

Applying these criteria to the case presently being examined, any work carried out from the workers home located in another country than the registered office of the employer entails the obligation to apply the tax rules of such country, where the worker carries out his/her activity, i.e. the home country.

Specifically, regarding the case of cross border employed activities between Germany and Austria a few specific rules apply:

- Art. 15 par. 6 of the Austrian-German agreement for the avoidance of double taxation contains a specific set of rules for persons who (i) have their residence close to the border of the other State, (ii) have their place of work close to the border in the other State and (iii) cross the border on a daily basis. In such cases, as exception to the general rule, taxation takes place at the place of residence.
- By means of the Consultation agreement dated 4/9 April 2019 for the interpretation of art. 15 par. 6 of the Austrian-German agreement for the avoidance of double taxation Germany and Austria have introduced further details to the taxation of cross border workers or, rather, to the privilege, from the worker’s perspective, to be taxed in his/her country of residence. Art. 1.1 of the Consultation agreement defines the border region as an area of 30 km air-line distance from the border. In order to benefit from the border rules, the Consultation agreement reiterates the general requirement that the worker has to cross the border on a daily basis, but with the exception that the worker con continue to benefit from the rules if he/she omits to cross the border for a maximum of 45 days during the calendar year (or 20% of the working days in case of employment with a duration of less than a year).
  If the afore-mentioned requirements are not satisfied, the worker is either taxed in the country where he/she carries out the main activities (e.g., if either (or both) the residence and the place of work do not fall into the border region) or at the offices of the employer as a general rule.

August 21st, 2023, Germany and Austria have reached a new agreementt[9], whereby **the time limit of 45 days is abolished**, with the

[8] *Commentaries on the articles of the Model tax convention (condensed version)*, OECD 2010, p. 251.

[9] Protokoll zur Änderung des Abkommens vom 24. August 2000 zwischen der Bundesrepublik Deutschland und der Republik Österreich zur Vermeidung der Doppelbesteuerung auf dem Gebiet der Steuern vom Einkommen und vom Vermögen in der durch das Protokoll vom 29. Dezember 2010 geänderten Fassung; https://www.bundesfinanzministerium.de/Content/DE/Downloads/Steuern/Internationales-Steuerrecht/aenderungsprotokoll-zwischen-der-bundesrepublik-deutschland-und-republik-oestereich-vom-21-08-2023.pdf?__blob=publicationFile&v=4

effect that any and **all employed activities within the limited of a cross-border situation are exclusively taxed in the country of residence of the worker**, irrespective of the number of days spent in home office. In addition, the new agreement contains a number of rules meant to exclude the coming into force of a permanent establishment, simplifying, whenever the local “institution” does not generate income for the employer. The new rules will enter into force as of January 1st, 2024, provided that the agreement has been ratified by both Countries.

In the case of taxation of the employee's income in his country, the employer, if it cannot make withholding deductions at source on the basis of rules it does not know, should pay the gross salary, so the taxes are handled directly by the employee in his country.

In addition to the potential risk of double taxation for the worker’s income, the operation of a worker from abroad can entail the risk for the employer that **the worker’s place of work abroad (his home-office) be considered as a “permanent establishment” and hence the related enterprise income may be taxable in the foreign State** where the worker carried out his home-work activities; in this case, double taxation of the employer’s income is also a risk.

To assess whether an entrepreneur establishes a permanent establishment abroad in connection with the employment of an employee who works in his home office abroad, the rules of international tax law, the respective applicable double taxation agreement between the concerned State of residence of the company and that of the home office of the employee and the local interpretation must be taken into account.

According to the **OECD Model treaty**, a home office does not as a rule constitute a permanent establishment, unless the employer asks his employee to permanently work from home and does not provide him with a workplace at the usual business place of business; in such case the home office is at the employer's disposal and may be considered a permanent establishment of the enterprise. The work activity at the home office must be permanent; a merely sporadic or occasional use of the home office does not constitute a permanent establishment; the same goes for activities that have a merely subordinate function within the business of the enterprise (e.g. auxiliary or preparatory activities) and do not generate revenue; many States also focus on who took the initiative for the home office activity (an employer's order would be critical but also the fact that the employee stipulates contracts on behalf of the employer from the home office may be relevant). The use and interpretation of these criteria may vary significantly from one country to the other. The German tax authorities, for example, see the existence of a permanent establishment much less frequently than the Austrian tax authorities. In order to establish the existence of a power of disposal, it requires that the employer has a comprehensive right of access to the employee's private premises used for business purposes or can influence the premises, which will not be the case in most cases[10].

The obstacles described by the applicant are therefore lessened in the area

[10] Wirtschaftskammer Österreich, Rechtliche Regelungen rund um das Homeoffice, Stand Mai 2022.

of social security and somewhat exacerbated in the area of taxation although the recent developments are an encouraging sign towards a uniform set of rules.

c. Applicable law to employment contracts

The law applicable to contractual obligations is governed by Reg. 593/2008[11] ("Reg. Rome 1"), which allows for the **freedom of choice of the law applicable to the contract** (art. 8.1).

Absent a choice of law, the applicable law is defined, in the following order, by reference to: **the place of work** (art. 8.2), t**he place of business** through which the employee was engaged (art. 8.3) and to such other country with which the labour relationship has the **closest connection** (art. 8.4) The parties' freedom to choose (or rather: the power of one party to impose) their own legal system is limited by the provision of art. 8.1, 2nd phrase[12] which basically ensures that **the employee is not deprived of minimum standards of labour law which would otherwise be applicable** if not for the choice of law (cfr. applicable law in accordance with articles 8.2 – 8.4). In addition, when choosing the law applicable to the employment contract the parties must take into account the overriding mandatory provisions of the law of the forum (art. 9.1. and 2. of Reg. Rome 1[13]). *"These are rules broader in scope than the protection of individual workers. These rules are applied in the general interest ("police and public order laws")"*[14]. Such a situation creates intrinsic **insecurity as to the exact contents of the employment relationship** since (i) it is not certain which legal system would hypothetically apply, and (ii) it cannot be foreseen which of the respective national legal provisions would be seen as in conflict with the chosen law chosen, and hence which provisions would finally apply. In such a situation the wisest choice would be that of choosing the laws of the country where the activity is carried out, which, in the case of home-working abroad, is, by definition, not the legal system with which the employer is familiar.

III. Description of possible solution(s)

Any solution to address the employers' concern and their goal to possibly apply their own national social security system, tax regime and labour law

[11] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6 - 16

[12] "Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article."

[13] *Article 9. Overriding mandatory provisions*

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding ist public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. […]

[14] Guide for Mobile Workers in Europe European Trade Union Confederation (ETUC) 2022, p. 55.

to all of their employees teleworking regardless of the country where they have their home offices, as well as any amendment to the current international legal framework, must take into account the diverging interest of the three parties involved, i.e.

- the Employer: the employer is interested in maintaining a single tax and social security regime for all its employees, to reduce uncertainties as to which regime applies and at the same time is interested in an efficient use of remote work with a view to reducing office space and hence reducing costs with a definite and permanent set of rules applicable to remote work; we cannot exclude an interest of the employer to apply a more favourable regime, but that would be contrary to any correct application of any legislation and therefore we will not address this concern;
- the Employee who is interested in maintaining as far as possible a unified insurance regime and, as the COVID 19 Pandemic has shown, he/she is increasingly interested in working from home and/or without a fixed base; and
- the respective States who are interested in taxing the income for those persons residing in their territory and hence are benefiting from the services provided by such State. At the same time States have an interest in contrasting cases of non-genuine foreign residences and, on the other hand, States (and communities in general) have a public interest in reducing travel and pollution, increasing working conditions in connection with the Sustainable Development Goals (SDGs) set by the UN 2030 Agenda.

We believe that the elaboration of possible solutions to the mentioned obstacles requires a double approach: (i) finding creative short-term solutions for individual cases in the current framework and/or (ii) amending the current EU legal framework by issuing new uniform and comprehensive provisions applicable to remote work in Europe. Whilst the first approach may serve the Applicant's (and employers in similar situations) needs in the short run, it is clear that the second approach will take time, since the burden is upon the competent institutions of the European Union and the Member States to elaborate such a solution.

(i) Short term/individual solutions

a. Applicable social security and tax law

As a workaround solution, employers who prefer to apply their national legal framework could adopt a number of measures to pursue the goal to avoid having to deal with foreign tax and/or social security systems.

- Gross wage agreements, whereby the employee becomes liable to paying taxes and social security contributions;
- Avoiding employment contracts at all, recurring, to the extent allowed by applicable law, to external consultancy solutions / enrolment of the worker as a free-lance or, on the other hand;
- Set up an employment contract with limited recourse to home-working time (below the 50% threshold for the signatory States

of the Multilateral Framework agreement in force since July 1st, 2023) and/or make sure that the home-working employees dispose of a work station/desk also at the premises of the employer (e.g. at least rotating/sharing with other employees) and/or carefully select the type of auxiliary tasks to be performed through home working.

Otherwise, employers who merely wish to avoid uncertainties as to which national regime will apply, and do not reject in principle the application of a foreign regime, can at least try to build up a situation in which the application of one or the other legal regime becomes certain, by 'piloting/controlling' the determining factors/criteria, e.g. by:

- Setting up a proper business unit in the foreign country; this kind of solution may reveal appropriate whenever the employer employs several workers from home offices located in the same country.

b. Applicable labour law

To a certain extent we assume that potential employers in cross-border employment relationships are already aware of the opportunity/need to make a choice of law within the employment contract. In any case, for purposes of solving the uncertainties deriving from a lack of choice, the primary solution is that of making such a choice and hence determine (to the extent possible) the regime and content of the employment contracts.

Nevertheless, an issue remains in respect of the mandatory nature of art. 8.1., 2nd phrase and art. 9.1 of Reg. Rome 1 which prescribe the mandatory applicability of those provisions of the worker's place of activity "*that cannot be derogate*d" and of all "*overriding mandatory provisions*" of the law of the forum. In this respect, there appear to be only two possibilities: (i) either to choose the law of the place where the worker carries out his/her activity or (ii) under the assumption that, at least in a contractual relationship between Austria and Germany, legal (minimum) provisions for the workers' safeguard are of comparable standards, to choose the law of the country where the company has its registered offices. It goes without saying that for other cross-border situations the basic assumption might not be correct and in any case such a solution provides only little certainty, or, in other words, it works only so long as a judge proves that the assumption is wrong.

At last, it must be taken into account that the legal criteria and the factual elements that determine or influence the definition of which national regime applies are different in the area of social security, tax and labour laws. It must be clarified that whilst the parties are free to choose the labour law of the employer's country of business/registration, there is no such freedom regarding the application of social security or tax law which may remain that of the worker's home-office. Therefore, if the employer seeks for a uniform social security-tax-labour legal framework for its home-office employees, when setting-up one of the solutions suggested under section a. hereinabove, it of course will have to coordinate the choice of law described under section b and, when evaluating which solution regarding the applicable laws is the most appropriate to the specific case, it should also analyse and consider the courts of which country would have jurisdiction in case of litigation.

(ii) Creation of a comprehensive framework

The competent institutions of the European Union and the Member States have already acknowledged the phenomenon of cross-border telework and are aware of the need to create a comprehensive framework applicable in a uniform way in all the EU and possibly also EFTA.

Recent developments as illustrated above show the willingness of the EU and national institutions to address the issue and overcome the described obstacles.

For instance, to the extent the social security framework is concerned, the multilateral Framework agreement (signed to date by 17 EU/EFTA Member States[15]) is the result of the work that has been done by the working group of the Administrative Commission for the Coordination of Social Security Systems to find a temporary solution on a European level that is in line with the current regulatory framework, while working at eventually amending it to reflect the new developments in the world of work[16].

On the other hand, to the extent the tax area is concerned, the Austrian-German agreement reached on August 21st, 2023, shows the readiness of these States to waive, to a certain extent, their right to taxation in the interests of the overarching interest to facilitate cross-border home office. We recommend encouraging the signing of a multilateral framework agreement with a uniform content in addition to the existing agreements for the avoidance of double taxation or, where such double-taxation agreements are absent, the uniform conclusion of such agreements between EU Member States.

In the end, to solve the obstacles made evident by the Applicant, in our opinion, it is desirable that the EU institutions and the Member States pursue the objective of creating a comprehensive framework applicable to cross-border telework/home office, drawing from the experience earned during the Pandemic COVID-19, when cross-border telework has become a widespread phenomenon throughout Europe e not only in "border situations" between neighbouring countries.

[15] Austria, Belgium, Croatia, Czech Republic, Finland, France, Germany, Lichtenstein, Luxembourg, Malta, Norway, Poland, Portugal, Spain, Sweden, Switzerland, The Netherlands, Slovak Republic.
[16] cfr. Explanatory Memorandum to the Framework Agreement on the application of Article 16 (1) of Regulation (EC) No. 883/2004 in cases of habitual cross-border telework, p. 1: *"... this framework Agreement offers a solution which combines the interests of the workers, the employers, and the social security institutions to face the reality of telework until the coordinating Regulations on social security will be adapted."*

IV. List of Legal provisions relevant to the case

- Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community;
- Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems;
- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I);
- Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems;
- Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004;
- Abkommen zwischen der Bundesrepublik Deutschland und der Republik Österreich zur Vermeidung der Doppelbesteuerung auf dem Gebiet der Steuern vom Einkommen und vom Vermögen vom 24. August 2000 (DBA-Österreich);
- Konsultationsvereinbarung vom 4. April/9. April 2019 zu Zweifelsfragen hinsichtlich der Auslegung der Grenzgängerregelung nach Art. 15 Abs. 6 des deutschösterreichischen Doppelbesteuerungsabkommens vom 24. August 2000 (BStBl 2019 I S. 456);
- Protokoll zur Änderung des Abkommens vom 24. August 2000 zwischen der Bundesrepublik Deutschland und der Republik Österreich zur Vermeidung der Doppelbesteuerung auf dem Gebiet der Steuern vom Einkommen und vom Vermögen in der durch das Protokoll vom 29. Dezember 2010 geänderten Fassung[17];
- Framework Agreement on the application of Article 16 (1) of Regulation (EC) No. 883/2004 in cases of habitual cross-border telework.

V. Other relevant aspects

Only for the sake of completeness, we add that in certain condition cross-border home office may entail also difficulties concerning the applicable data protection law and residence and work permits in case of (i) an EU citizen choosing his/her home office abroad or (ii) e non-EU citizen is

[17] https://www.bundesfinanzministerium.de/Content/DE/Downloads/Steuern/Internationales-Steuerrecht/aenderungsprotokoll-zwischen-der-bundesrepublik-deutschland-und-republik-oestereich-vom-21-08-2023.pdf?__blob=publicationFile&v=4

employed.

VI. References/Appendix

See documents mentioned in the footnotes.

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