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WTS Global Mobility Newsletter

Editorial

Dear Reader,

We are pleased to present to you the 2nd edition of our WTS Global Mobility Newsletter for 2020. Virtual work is here to stay and the challenge for employers is whether or not this should also be made available for cross-border workers in general – not only during times of a pandemic (e.g. COVID-19).

At the onset of the COVID-19 pandemic in the first half of 2020, many companies were faced with local employees and business travellers who were stuck in another country and continued to work virtually. There were also foreign local hires, who could not start at their desks due to closed borders and who just started their work from their home country.

Although there is another lockdown again in many countries right now, the COVID-19 crisis will pass, but the demand for home office/work from anywhere will remain. There are huge compliance and HR issues, ranging from taxation, social security, immigration, duty of care to compensation levels, payroll and permanent establishment risks.

Within this WTS Global Mobility Newsletter, we would like to show you the most important consequences country by country, based on a small case study – a typical example seen a lot in practice over the last few months.

The example is very simple – but are the consequences just as simple?

A company has an employee who should work in the same country where the company is situated. However,

a) due to COVID-19, the employee is working remotely from a different country – his home country,
b) even after the COVID-19 crisis (and therefore without any grace periods), he is still working from a different country – his home country.

We hope you find our newsletter useful and we welcome your feedback and suggestions. Our experts in the WTS Global Mobility team will be happy to answer any questions you may have regarding any aspect of this newsletter.

Enjoy reading,

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Contents

Austria: Home Office work in Austria and consequences due to Covid-19 3

Chile: COVID-19 crisis, forced permanency and PE 4

China: Does the coronavirus cause any impact on the IIT of individuals stranded in China? 5

Costa Rica: Tax treatment for employees staying in Costa Rica 6

Czech Republic: The influence of anti-COVID measures on tax residence and affiliation to social insurance regulations 7

Germany: Stay compliant when working from home 8

Hungary: Expat employees working from home 9

Italy: Issues related to working from home or remotely during the Covid crisis 10

Kenya: Virtual work – Tax considerations of the new normal 11

The Netherlands: Working from home due to the coronavirus: the Dutch tax impact 12

Poland: COVID-19 tax and social security guidelines still to come... 13

Portugal: Working remotely from Portuguese home office due to the pandemic and beyond... 15

The Russian Federation: Stuck in Russia due to the Corona pandemic 16

Sweden: Swedish tax liability for individuals during COVID-19 17

Turkey: Working remotely from Turkey 18

Ukraine: Migration and taxation issues in times of COVID-19 20

Vietnam: Does having an employee in Vietnam create a permanent establishment? 21

Please find the complete list of all contacts at the end of the newsletter.

Austria

Home Office work in Austria and consequences due to Covid-19

Example: Mr A (residing in Austria) is an employee of company X established in country X. So far, Mr A. commutes to company X in country X to carry out his work.

Scenario 1: Mr A and X agree that, from now on, Mr A can work 100% remotely from his home office in Austria (independent of the COVID-19 pandemic).

Scenario 2: Mr A and X agree that, (only) during the COVID-19 pandemic, Mr A can work 100% remotely from his home office in Austria.

Tax and social security implications of scenario 1 (permanent home office work in Austria)

The Austrian tax administration takes a "facts and circumstances-approach" to assess whether home office work creates a **permanent establishment (PE)** for the foreign employer. The main criteria are the extent of home office work, the nature of work carried out in the home office and whether it was initiated by the employer or by the employee. In the case in question (100% remote work from an Austrian home office), it is very **likely that the tax administration assumes that a PE is created.** In addition, home office work would trigger municipality tax (3% from employee's gross wage).

Mr A is subject to Austrian income taxation. Contrary to other countries, the foreign employer will have to **deduct and pay monthly Austrian wage tax,** irrespective of whether or not the home office work creates a PE (new wage tax withholding regulation applicable as per 01/01/2020).

As Mr A spends 100% of his working time in Austria, he is also subject to Austrian social security regulations. Company X will have to register with the competent Austrian social security authorities and **deduct and pay monthly Austrian social security contributions** (employee and employer part). If company X is located in another EU country, Mr A and X could agree that these compliance duties are fulfilled by Mr A. However, in practice, this is rarely carried out, as all non-compliance risks would remain with the foreign employer. In addition, the foreign employer will have to pay a contribution to the Austrian family support fund (3.9%).

Tax and social security implications of scenario 2 (home office work in Austria only during the COVID-19 pandemic)

The Austrian tax administration takes the position that, if home office work is performed only temporarily during the COVID-19 pandemic, the home office will **not create a PE** for the foreign employer.

As regards Austrian income taxation, there is no difference to scenario 1. Also, in the event that home office work is only performed temporarily in Austria, the foreign employer will still have to **deduct and pay monthly Austrian wage tax.** Only in the event that company X is a German resident company, Austrian income tax (and by that, wage tax withholding) could be avoided. This is due to the fact that, according to a mutual agreement on the tax-implications of COVID-19 concluded between the **German and Austrian tax administration,** the employee could **opt** (no obligation) **to remain subject to German income taxation.**

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As regards social security, the competent Austrian ministry takes the view that temporary restrictions on cross-border employment imposed by **COVID-19 do not constitute relevant changes** as regards the applicable social security legislation. This means that, in the case of COVID-19-related temporary home office work, the employee will remain within the applicable foreign social security legislation of country X.

Chile

COVID-19 crisis, forced permanency and PE

Due to the global situation of COVID-19, we analyse herein the case of individuals who were temporarily working abroad as employees of an enterprise of another country, different from the country of residence. We shall specifically refer to those individuals who have not been able to return to the countries where they live due to the pandemic and due to the quarantine measures declared in the second country. The question that arises is whether, in such case, according to the rules in force of a Double Taxation Agreement between both countries, a fiscal residency is acquired in the country of origin, according to Article 5 No. 3 of said Agreement.

The tax authorities can decide to apply the Agreement literally, by taking a formalist position. In this scenario, it can be established that, every time an individual who works for an enterprise based abroad and without a fixed base in the other country, exceeding the 183-day deadline in any twelve-month period, will be a permanent establishment in the other country for the enterprise that provides services. This will apply independently of the circumstances and, consequently, it would apply during the pandemic.

However, there are different ways to resolve this apparent conflict, whilst applying the rules established in said agreements. In fact, Article 4 of the OECD model sets out the rules of residency through the general principle that states that a person can only be a resident of one state at a time. To begin an analysis in this regard, local rules have to be considered. From a Chilean perspective, the rule of remaining more than 183 days in a twelve-month period in a country applies. In this sense, supplementary rules will have to apply to resolve the conflict.

In this sense, the secretariat of the OECD issued a technical letter on 3 April of this year that sets out the guidelines and criteria to resolve this residency conflict. Firstly, said secretariat states that carrying out economic activities of an enterprise from the sporadic place of residence of an employee in the other country, which is exceptional due to an extraordinary event such as COVID-19, does not necessarily mean that it should create PEs for the businesses.

For an enterprise to trigger a permanent establishment in a different country, there must be continuity and habituality in the use of the means available with a general character, not with an exceptional one, such as in this case. The fact that an employee of an enterprise must remain physically in a place of residence due to an emergency does not imply that said means are at the full disposal of the enterprise. "The exceptional and temporary change of the location where employees exercise their employment due to the COVID-19 crisis, such as working from home, should not create new PEs for the employer."[1]

1 OECD Secretariat analysis of tax treaties and the impact of the COVID-19 crisis © OECD 2020

The OECD, in its analysis, specifies that the fact that an individual must necessarily remain in a place during the COVID-19 crisis, would be the result of a directive or government instruction. Therefore, it is a **force majeure** and not a requirement of the employing enterprise.

As a result of the foregoing, the analysis of the OECD secretariat encourages tax administrations to issue instructions and guidelines in relation to the application of internal rules on residence.

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China

Does the coronavirus cause any impact on the IIT of individuals stranded in China?

One question may arise due to the coronavirus: does the coronavirus cause any impact on the IIT of individuals stranded in China?

The China State Administration of Taxation (SAT) has recently responded to some hot questions in interpreting the coronavirus-affected tax treaty clauses and has taken a concession view. In the SAT's response, it explains that, if an individual has to change his/her place of residence due to COVID-19 control measures and has become a resident in both places, such a temporary stay should not usually cause a person to relocate his or her permanent home or centre of vital interests. Thus, it should not affect residency under a tax treaty.

However, the above interpretation may not work if the individual is a Chinese national. For example, a German company has a Chinese employee who should work in Germany but who stays in China due to the coronavirus and is working remotely from China for the German company. Even after the coronavirus crisis, the employee stays in China and works remotely from China for the German company.

The individual is a Chinese national and spends most of his/her time in China, which gives strong reasons to Chinese tax authorities to treat him/her as a Chinese tax resident. Therefore, his/her worldwide income is very likely to still be taxed in China, both during the coronavirus period and also afterwards.

If he/she is also taxed in Germany, the IIT paid in Germany may be deducted from his/her China tax; however, the deductible amount shall not exceed the tax payable amount computed by the Chinese tax calculation method for the Germany-sourced income (known as the tax credit limit). If the German tax paid is less than the tax credit limit, the difference should be paid to the Chinese tax authority; if the German tax paid is above the tax credit limit, the excess cannot be deducted from the Chinese tax payable for the current tax year, but it can be carried forward to the tax credit limit for the same country (region) in the next five tax years.

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Costa Rica

Tax treatment for employees staying in Costa Rica

Scenario: A "foreign" company (such as, for example, a German entity) has an employee who should work in the same foreign country (i.e. in Germany). However,

a) due to the coronavirus, he is working remotely from his country (i.e. he returned, for instance, to Costa Rica and could not go back to Germany for work due to the coronavirus – thus, he is working for the German entity from his home office in Costa Rica),

b) even after the coronavirus crisis, he is working from his country (i.e. he works from his home office in Costa Rica, but no longer due to coronavirus-related travel restrictions, but because he has an agreement with his German employer.

Tax Treatment based on the CR – Germany's Tax Treaty

CR Tax Administration has not issued a ruling (we do not expect it to do so) in relation to these matters, therefore, we shall comment based on the current tax provisions.

The employee can fit into two possible regimes, a. Salary Income Tax, or b. Salary on remittances abroad; the former considers the employee a tax resident, the latter does not.

If we base the analysis under the TT, the domestic rules to identify the tax residence are not applicable, therefore the TT will prevail.

According to the TT's rules to distinguish the possible double tax residence and assuming the employee has his home, family and source income in Germany, he would be considered as non-tax resident under CR-tax regime b., therefore, the employee must pay over the gross income, at a tax rate of 10%.

If Germany also claims the employee's tax residence, his salary can be taxable in Germany. Any double taxation in Germany would be either avoided by exemptions with progression or by a foreign tax credit.

Permanent Establishment

In the scenario between countries without TT in force, if the individual remains more than 183 days working for a foreign company, it is advisable to analyse the Permanent Establishment (PE) rules from the subjective perspective. If the foreign entity fulfils said rules, it must register as a CR taxpayer and the person can be deemed an employee for CR Social Security purposes.

If the foreign entity does not have a PE, the individual must register as a taxpayer and pay taxes following the Professional Services Tax Regime.

If the employee does not reach the term of 183 days, he would be deemed as a non-tax resident, being obliged to pay over the gross income, at a tax rate of 10%.

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Czech Republic

The influence of anti-COVID measures on tax residence and affiliation to social insurance regulations

During the last six months, national governments have applied various measures restricting the movement of people. These measures not only affect the private lives of individuals, but also limit or change the conditions under which said individuals can carry out their work.

The temporary restriction on the free movement of people as a result of the COVID-19 pandemic may prevent employees from staying in another country or traveling for work, as they have been accustomed to in the past. In such cases, these people are forced to carry out their activities in the location where they have been residing during the pandemic, e.g. from their residence. Due to the fact that the local as well as international legislation work in determining tax residence, the place of income taxation and affiliation to social security legislation with both residence and place of business, there is uncertainty as to whether this situation has an impact on taxpayer obligations.

The Czech authorities are not approaching this issue in a uniform manner.

In the spring of 2020, when the first measures against the free movement of persons entered into force and a number of companies began to introduce or extend the possibility of working from home, the social security authorities of the Czech Republic issued their first and, as yet unchanged, statement. They reassured the public that, in their interpretation, employees should remain under the original insurance scheme for the duration of the temporary measures. The reasoning was that this was a temporary situation which was caused without regard to the taxpayer's intentions and, if there is a presumption that the taxpayer's activity will continue in its original format after the end of emergency measures, there is no reason to reassess the social security affiliation.

From the social security point of view (i.e. social and health insurance), assigned employees and their employers are therefore not obliged to notify the locally competent social security office in the Czech Republic of this temporary change of situation (i.e. home office in the Czech Republic or abroad). There is also no obligation to return previously issued certificates of affiliation to Czech social security legislation (A1 certificates), provided that, after the end of the extraordinary restrictions, these people will continue to work in the territory of more than one member state as before.

However, as the habits of taxpayers who have the opportunity to work from a home office for a long period of time change during the ongoing pandemic, we believe that the assumption of continuing in the original formats will not be met in all cases. For this reason, in some cases, there will be a real reassessment of affiliation to social security legislation.

Following measures taken by governments in many countries to curb the spread of the COVID-19 pandemic, the OECD has issued a series of recommendations on how to approach the situation. As part of this, it also published a manual on how specific states should approach these measures from the international taxation point of view, including the

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issue of a possible change in the residence of individuals. However, the Czech Tax Administration has not openly stated that it intends to follow this recommendation. Rather, the results so far show that it will apply the wording of specific bilateral agreements on the avoidance of double taxation. In addition, the opinion is based on the wording of the OECD Model Treaty, therefore, it is always necessary to take into account not only the assessment of aspects of the specific situation, but also the wording of the relevant bilateral agreement. The situation will be monitored further in the Czech Republic.

Germany

Stay compliant when working from home

a) Home working in Germany due to the coronavirus

Based on the numerous double taxation treaties (DTT) Germany has concluded with other countries, the salary for work performed in German home offices is taxable in Germany as the country of treaty residence. Thus, the right of taxation is generally shifted from the original country of employment to Germany.

To mitigate the tax consequences of the home-working days caused by the pandemic, Germany has concluded consultation agreements with the following 6 countries: Belgium, France, Luxembourg, The Netherlands, Austria and Switzerland.

The agreements stipulate that days spent working from home due to COVID-19 may be deemed to be spent in the state where the employee would have carried out the work without the current COVID-19 measures. This allows for the option of taxing the German working days either in Germany or in the country of employment. Proof of taxation and employers' certificates of days worked from home must be available.

It should be noted that these agreements do not apply to working days which would have been spent either in the home office or in a third country independently of COVID-19. Specifically, they do not apply to working days that are regularly exercised in the home office according to the employment contract.

Some employers may be concerned that home working will create a permanent establishment (PE), which would trigger new filing and tax obligations. However, it is rather unlikely that COVID-19 measures will create any changes to a PE determination. The exceptional and temporary change of the location from which the employees perform their work due to the coronavirus should not create new PEs. Similarly, the temporary conclusion of contracts from the home office due to the coronavirus should not create PEs for the businesses.

Concerning social security, the principle of territoriality applies. This means that the employee is, in principle, subject to social security in the country where the work is carried out. In the event of secondment, regulations deviating from the territoriality principle are possible, which must be applied for in the context of an A1 certificate, for example. In the event of an interruption of a secondment due to the coronavirus, which does not exceed 2 months and does not extend the total duration of the secondment, the A1 certificates issued remain valid.

In the event of employees who regularly work in several EU member states on a recurring basis, the application of social security law depends on the extent of the activity in the respective member states. A coronavirus-related different distribution of the activity in the respective states does not, however, lead to a different assessment.

b) Home working in Germany after the crisis

The consultation agreements will be cancelled at the end of the coronavirus crisis. Then, only the general provisions of the DTT shall apply. These assign the right of taxation for German home-working days to Germany as the country of treaty residence.

A review of the risk of establishing a PE due to home working should be carried out carefully. This is because, unlike coronavirus-related home office activities, home office activities are designed to be permanent. In case of a PE, withholding payments will be due.

Concerning social security, the performance of work in the home office can lead to a shift in the applicable social security law. It is strongly recommended to check this before starting the activity from home.

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Hungary

Expat employees working from home

Employees working in a different country to that where the registered office of their employer is located raises several taxation issues.

Personal income taxation of expats

According to the OECD convention for the avoidance of double taxation, a person is considered resident if he/she has a permanent home in the given country. If a person qualifies as a resident in more than one country according to the domestic laws, then the following aspects have to be considered when defining residence:

- permanent home;
- centre of vital interests;
- habitual abode;
- citizenship.

To determine where the income from non-independent activity is taxable, firstly, the tax residence status of the expat worker has to be determined on the basis of the above criteria. Once tax residence is established, it is necessary to examine where the income deriving from the non-independent activity and received for the posting should be taxed. Based on the conventions avoiding double taxation, the country of residence is the country of taxation, provided the expat works in this country. If, however, work is carried out in a different country than the country of residence, the tax payment obligation arises in the country of work.

Personal income taxation during the pandemic

Due to the COVID-19 pandemic, plenty of expats and other workers living in border towns and commuting to neighbouring countries had to stay in Hungary and work from home offices during the lockdown. Where should the income earned during the home office period be taxed?

The residency position of cross-border commuters does not change due to the pandemic; however, the country of work is now the same as the country of residence. The income from non-independent activity is now, in this new situation, taxable in Hungary. This has consequences for the employee, such as quarterly tax advance calculations and payment obligations.

If the employee temporarily changes his/her permanent residence due to COVID-19, in accordance with the OECD guidance issued in April, "despite the complexity of the rules, and their application to a wide range of potentially affected individuals, it is unlikely that the COVID-19 situation will affect the treaty residence position". This means that, when establishing residence for the (hopefully!) transition period caused by the coronavirus, the authorities should consider the employee's normal living conditions. Unfortunately, the Hungarian Ministry of Finance has not yet published its official opinion in this regard.

Social security

If the Hungarian working hours of a Hungarian individual working abroad did not reach the 25% limit before the pandemic, his/her social security obligation arose in the Member State of work. Therefore, said individuals were covered by the social security system of that country. As a result of the quarantine measures implemented due to the global pandemic, the increase in working hours spent involuntarily at their place of residence in Hungary often resulted in cases where the 25% limit was exceeded. The guidance issued by the European Commission in March 2020 formulates a recommendation for such cases: in cases which could lead to changes in the employee's Member State of insurance, the Member States should apply the exception defined in the coordination regulation so that the social security entitlement of the affected employee remains unchanged.

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Italy

Issues related to working from home or remotely during the Covid crisis

The possibility of employees of working outside of company premises – so-called smart working – was governed in 2017, with the labour law reform known as the "Labour Law".

The governance of the smart-working mode requires that the employer and the employee enter into a specific agreement. The possibility of a different governance with the involvement of the trade unions is currently subject to major debate.

Currently, the individual agreement should include the following aspects: the work premises address, other than the usual address, duration and the work execution mode (for normal work coordination). The foregoing assumes that the Company has adopted a specific work mode, considering also the following key aspects: the right to disconnect in order to favour the work/life balance, work time, daily and weekly breaks and the limits to the remote control of the work activity.

The COVID-19 health crisis has led to an exponential spread of the recourse to the remote-working mode, given that the health and safety policies adopted by employers define remote work as a key prevention measure.

The Italian legislator has introduced a temporary simplified regime (to date effective until 31 December 2020) to enable private employers to resort to remote work without the prior consent of the employee, provided that the list of the employees involved is duly submitted to the Ministry of Labour.

On the other hand, no governance has been enacted to deal with the possibility that the work activity is executed remotely from abroad.

Given that the main principle to identify the applicable law – for both labour and social security – is the place of execution of the work activity, its remote execution from abroad is becoming a crucial point that shall be considered in a necessary update of the local and European legislation.

On the other hand, from a tax standpoint, the main consequences that may arise may be summarised as follows:

- the risk of rise of an agency PE of the foreign company in the other State: the OECD has clarified that the agent's activity in a different state should not be deemed as "habitual" as long as restrictive measures are in force; to date, Italy has declared the state of emergency until 31 January 2021;
- an individual may become resident in both countries under domestic law. If the employee is also an executive director of the company, his inability to travel may cause a potential change in the "place of effective management" of the company and, therefore, a change of its residence for tax purposes. In both cases, if the two countries signed a Double Tax Convention ("DTC"), the double residency question should be addressed with the application of tie-breaker rules;
- the Italian Tax Code provides for a special regime (taxation on conventional values) for employees working abroad for more than 183 days a year. The fact that the activity is carried out in Italy, if interpreted rigidly, would exclude the possibility to apply the special regime;
- DTCs between Italy and France, Switzerland and Austria contain a specific provision for cross-border workers. In the summer of 2020, it was agreed in three special agreements with the aforementioned states that said DTC provisions shall not be affected by the fact that workers are unable to commute (or are advised not to do so) to the other country. These mutual agreements will apply until the end of 2020 (France) or until the parties agree to end it (Switzerland and Austria).

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Kenya

Virtual work – Tax considerations of the new normal

At the time of the onset of the COVID-19 pandemic in Kenya, the President of Kenya made certain directives to cushion the country against its impact on employment and to increase disposable income. With a view to containing the spread of the virus, international flights to and from Kenya were suspended on 25 March 2020. These restrictions were, however, lifted on 1 August 2020 subject to certain conditions. Amidst all these changes, many employers also implemented work-from-home protocols to minimise the mobility of their employees, ensure social distancing and, ultimately, facilitate the safety of their employees.

As a result, there arose instances where employees of foreign companies were stuck in Kenya and unable to travel to their places of work abroad and were, therefore, forced to remain and work remotely from Kenya. This has resulted in tax implications such as permanent establishment (PE) and individual residency risks.

The remote working of employees has raised concerns regarding the creation of PE risks for their foreign employers in Kenya. According to Kenya's Income Tax Act (ITA) in which an agent has - and habitually exercises - authority to enter into contracts on behalf of an enterprise, there is a PE. Accordingly, part of the employer's profits will be treated as having accrued in Kenya for this period and is, therefore, taxable in Kenya.

As regards tax residence, the ITA considers an individual a resident if that person either has a permanent home in Kenya, or that person was present in Kenya for a period of 183 days or more in that year of income, or that person was present in Kenya in that year of income and in each of the two preceding years of income for periods averaging more than 122 days in each year of income. Noting that a resident individual is subject to tax in Kenya on his/her overall income, a resident individual who is an employee of a foreign company will be subject to tax on his/her worldwide income and virtual employment will not impact this. This is, however, subject to the existence of a double tax treaty between Kenya and the country of residence of the foreign company. Conversely, a non-resident employee of a foreign company will only be subject to tax on income deemed to have accrued in Kenya, which would be the case where the employee continues to work remotely from Kenya during the COVID-19 crisis and even thereafter.

The Organisation for Economic Co-Operation and Development (OECD) considers that, due to the exceptional nature of the COVID-19 crisis which has led to the inadvertent temporary dislocation of individuals globally, the same would not create a PE risk and tax administrators should not assess the existence of a PE risk given the current circumstances. In addition, the OECD has encouraged tax administrations to consider a more normal period of time when assessing the resident status of an individual. The OECD has also encouraged countries to develop country-specific guidance to provide clarity. Kenya, which is not an OECD member, has yet to release country guidance with respect to COVID-19 and the tax impact thereof in relation to the tax issues discussed herein.

Notwithstanding the above, it is evident that virtual work will, for most organisations, remain the norm and the Kenyan tax laws may have to be adapted to accommodate this even after the pandemic.

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The Netherlands

Working from home due to the coronavirus: the Dutch tax impact

Covid-19 measures have forced many employees to work from home. Working from home has tax and social security consequences when this home is in a country other than where an employee would normally work. Therefore, the Dutch authorities concluded an agreement with the Belgian and German authorities to mitigate the tax and social security impact from working from home. It is a temporary measure, in line with the OECD recommendation.

In a nutshell, it was agreed that home-working days due to the Covid-19 measure can be deemed as working days at the place where the employee would normally work. This would avoid changes in taxation and social security premiums. However, these are temporary measures and only apply between the Netherlands and Germany and the Netherlands and Belgium.

In the event that the temporary measures do not or no longer apply, working from home can result in Dutch wage tax and social security obligations as well as in corporate income tax and VAT obligations, depending on the activities of the employee. This leads to the obligation for the foreign employer to register in the Netherlands for tax purposes.

The Dutch-based employee is liable to Dutch personal income tax for any working day outside of the foreign country where his employer is located. In addition, Dutch social security obligations are triggered for the foreign employer when the employee starts working a substantial part (generally 25% or more) of his activities in his Dutch home country (on an annual basis). When the activities of the employee trigger a permanent establishment, apart from a corporate income tax and a possible VAT obligation, a Dutch wage tax withholding obligation also starts for the employer.

If the employer has only an obligation to register for Dutch social security premiums, due to the amount of Dutch working days of his employee and given the non-existence of a permanent establishment, the employer can also voluntarily register for wage tax purposes, facilitating the Dutch taxation of the employee. As the Dutch wage tax and Dutch social security premiums are covered by the same wage tax return, voluntarily registering for wage tax purposes would not necessarily lead to additional costs.

Given the comments on the 2017 OECD Model Tax Convention, a permanent establishment could nowadays be triggered when a home office is used on a continuous basis and the employee is required to use his home office, e.g. as his employer did not provide an (usable) office, but where the nature of employment clearly requires an office. This is probably not the case for an employee who is normally at the office of his employer, outside of the Netherlands, but is at his Dutch home due to Covid-19 measures. However, when being at home becomes more permanent, this could be deemed to differ. In addition, whether the permanent establishment is actually triggered in case of a home office also depends on the actual activities of the employee in the Netherlands. The permanent establishment is in principle defined by the tax treaty in place, in combination with the applicable alteration by the multilateral instrument and, therefore, the definition of a Dutch permanent establishment depends on the country where the employer is located.

If it is unclear whether a permanent establishment exists: WTS has extensive experience with providing/obtaining certainty on the (non-)existence of a permanent establishment.

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Poland

COVID-19 tax and social security guidelines still to come

The last few months have proven that travel restrictions or mandatory quarantine measures due to COVID-19 cause not only inconvenience to private life, but also the urgent need to determine tax and social security consequences of remote working.

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Poland has implemented a few anti-crisis shields since the outbreak of COVID-19. They provide for the following setup of remote working:

- the employer may recommend remote working until 3 months after the termination of the epidemic and is obliged to provide tools and materials needed for remote work and logistical support for remote work;
- the employee must have the skills, technical and housing capabilities to perform the work remotely and the type of work itself allows for remote working and depends on instructions from the employer;
- the employer is obliged to keep records of the activities carried out, including, specifically, a description of said activities, as well as the date and time of their performance.

Nevertheless, anti-crisis shields do not refer to tax or social security consequences.

On 3 April 2020, the OECD issued the "Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis", which addresses several tax concerns. The document clearly shows that: it is very unlikely that teleworking triggered by COVID-19 will affect the treaty tax residence position. Furthermore, tax obligations arising in the country of home office should be suspended or a way should be found to refund the tax to the employee.

Polish tax authorities have neither commented on the OECD Secretariat Analysis nor issued a statement presenting their own position. Neither have there been any private rulings issued lately for applicants in comparable cases. Bearing in mind the lack of local guidelines, employers and their remote workers may search for the answers in the OECD publication. At the same time, the approach of the Polish tax authorities must be observed very carefully in the coming months.

A similar conclusion applies to social security. The Polish Social Security Institution (ZUS) has not commented on the consequences of remote working caused by COVID-19. Whenever the official statements were issued, they referred to other pending topics. For example: suddenly, many employees, although healthy and able to work, were placed in quarantine due to contact with a person suffering from COVID-19. The ZUS confirmed employees' right to carry out work remotely and receive a full salary during quarantine.

It is expected that temporary solutions will influence the post-COVID employment model in many industries which do not require constant presence on site.

If the home office becomes an employee's permanent place of work in the future, then personal income tax and social security consequences must be determined under standard rules. In general, such an arrangement will simply lead to the obligation to pay taxes (on a monthly and annual basis) and social security contributions (on a monthly basis) in Poland. Depending on the specific scenario, registration in Poland or an additional agreement with the employee on assumption of the remitter's duties may be needed.

Employers should also keep in mind that they may become CIT/VAT liable in Poland due to an employee's remote work. Detailed terms and conditions of employment will prejudge whether an employer has so-called permanent (CIT) or fixed (VAT) establishment in Poland.

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Portugal

Working remotely from Portuguese home office due to the pandemic and beyond

A "new normal" is emerging and remote working will, for many people, be their default working arrangement. This paradigm shift entails several complex issues, as the Portuguese law and authorities may not accompany the pace of change of business and technology.

The spread of COVID-19 has forced governments to restrict international travel. As a result of these restrictions, many employees are unable to perform their activities in their country of employment and are performing their duties in Portugal, without being residents for tax purposes.

From the tax perspective, the Portuguese Tax Authorities remain (almost) silent, even though remote working already has a wider use and should remain so in the post-COVID-19 era. The topic is quite relevant as, similarly to most tax systems, under Portuguese domestic tax law, an individual should be deemed a resident for tax purposes in Portugal, especially if he/she is physically present in Portugal for more than 183 days per each twelve-month period. Thus, if employees reach this threshold, they may be subject to Personal Income Tax ("PIT") on a worldwide basis. Despite the remarks made by the OECD on this matter during the widespread lockdown, according to which *"if a tax treaty is applicable, the person would not be a resident of that country for the purposes of the tax treaty",* we see it as highly unlikely that the Portuguese Tax Authorities would allow for an individual who spends more than 183 days in Portugal to be treated as a non-resident individual for PIT purposes.

On the other side of the coin, the employer entities may be faced with permanent establishment risks resulting from the activities performed by their employees abroad (if they do not only perform ancillary activities).

As regards social security, under Portuguese domestic law and EU Regulations, the relevant criterion to define where social security contributions should be paid is the place where the work is carried out. Therefore, individuals working in Portugal should be subject to Portuguese social security contributions, regardless of their country of residence. This means that, in the situations in which the employer does not have any presence in Portugal, practical payroll problems could arise, as the payment of the social security contributions must be ensured by the employer. Fortunately, for the time being, the pandemic has not increased any administrative burden for foreign entities with employees working in Portugal during the lockdown, as the Portuguese Social Security Authorities have issued guidelines exceptionally determining that travel restrictions resulting from the pandemic should not imply any change in the applicable social security framework.

Nonetheless, in the post-COVID-19 era and if remote working continues to increase, there will be challenging times ahead: as we stand right now, the social security legislation of the Country where the activity is performed shall prevail, which means that employers will either prepare to engage payroll services in the Country where their employees are performing their activity or delegate them to the local social security obligations. The alternative would be to establish a new rule, according to which the legislation of the Country

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where the employer is located should prevail over the legislation of the country where the activity is carried out. That might be a less burdensome alternative for employers but could also be less attractive to employees, who typically prefer to pay social security in the Country where they live, work and are more likely to retire. In any case, the "new normal" that COVID-19 has brought requires a thorough reassessment of these matters.

The Russian Federation

Stuck in Russia due to the Corona pandemic

There is still a wide range of countries that are locked down for flights from the Russian Federation (RF) due to COVID-19 and some foreign citizens are unable to get home from the RF. Furthermore, we will consider some issues which may affect tax compliance of these foreign individuals and the companies the employees work for.

There are special provisions stated by Presidential Decree[1] which allow foreign citizens, whose migration documents, such as registration certificates, visas, temporary residence permits, residence permits and migration cards, expire within the period 15 March 2020 – 15 December 2020 to stay in Russia without the need to extend any of the documents listed above.

Another issue to be taken into consideration is the tax residence status of foreign individuals as regards the personal income tax perspective (PIT). In compliance with the Tax Code of the Russian Federation[2], individuals who are present in the RF for a period exceeding, in aggregate, 183 days over 12 consecutive months should pay PIT from their renumeration and need to file a PIT return in the RF. Recent changes[3] in the TCRF allow for a reduction of these terms from 183 to 90 days upon the written request of the foreign individual. In general, it affects the tax rate and reduces it from 30% to 13%. In the event that the DTTA, between the RF and the employee's country, establishes 183 days, then, from our point of view, the DTTA will prevail over the TCRF.

Modern technologies and economic digitalisation allow for employees to work remotely (e.g. software development, sales management, research, etc.). Foreign companies (Company) whose employees are stuck in Russia face another issue – permanent establishment (PE) onset. Thus, the Company should examine whether or not the employee carries out work related to doing business in the RF. If so, then it might create risk of PE.

As a brief refresher of TCRF rules, please pay attention to the following criteria[4]: (1) any place for business activity (i.e. the duration of the presence of an employee working for the company exceeds 30 days[5]); (2) regularity of the business activity; (3) type of business activity. Double tax treaty agreements (DTTA) between Russia and foreign countries should be taken into consideration as well as the fact that it might contain other provisions regarding PE (e.g. construction site, etc.).

1 Presidential Decree 274 dated 18/04/2020
2 paragraph 1, 2 Article 207 and subparagraph 3 paragraph 1 Article 228 of the TCRF
3 paragraph 2.2 was implemented into Article 207 of the TCRF and is effective starting from month dd, 2020
4 paragraph 2 Article 306 of the TCRF
5 based on the Decree of Ministry of Finance of the RF No. 293n as of 28/12/2018

The next issue which may arise is linked to the abovementioned points (i.e. PE and the tax residence status of a foreign employee). It is related to payment of obligatory social contributions[6] which depend on the remuneration and migration status of an employee. In summarising the above, if an employee of a foreign company is stuck in Russia due to COVID-19, the following should be kept in mind:

- Migration exemptions for foreign individuals are effective until 15 December 2020
- Possible tax obligations of foreign individuals on PIT and filing PIT returns due to tax residence status
- Risks of PE of the company and social contributions on remuneration of an employee who is stuck in the RF

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Sweden

Swedish tax liability for individuals during COVID-19

Individuals who work from Sweden during a continuous period of more than six months are normally fully taxable in Sweden. The reason for the stay in Sweden is not relevant for the assessment. Therefore, even if the stay in Sweden is due to the COVID-19 crisis, a person can become liable for tax if the stay exceeds six months. If the person is also a tax resident of another country, any double taxation is normally resolved through the applicable double tax treaty. People who work in Sweden but who are not tax residents of Sweden can be taxed under the regulation on special income tax for non-residents at a flat rate of 25%. However, the rules do not apply if the stay exceeds six months.

Employment income received by a Swedish tax resident on assignment abroad can be exempt from Swedish tax. The rule is applicable if the assignment abroad lasts for at least six months, the income is taxed in the country from which it is derived and the number of days spent in Sweden during the assignment period do not, for any reason, exceed 72 days during an assignment year abroad. To the extent that these employees are forced to reside in Sweden for longer periods due to COVID-19, the six-month rule can be jeopardised. However, even if all conditions are not formally met, the rule can still be applicable in the case of "force majeure", provided that the employee, at the beginning of the assignment, had good reason to believe that the six-month rule would apply. However, if an employee cannot start the assignment abroad due to COVID-19 restrictions, the exception would most likely not be applicable.

Under the 183 day-rule, salary can be tax exempted if a person's stay in Sweden does not exceed 183 days and the remuneration is not borne by a permanent establishment in Sweden. The COVID-19 crisis may cause concerns that employees performing their work from Sweden due to restrictions may result in the creation of a permanent establishment. It is the opinion of the Swedish Tax Agency that the COVID-19 crisis does not affect the limit of 183 days, but that the exceptional and temporary change of the location where employees exercise their employment, such as working from home, should not create a permanent establishment for the employer. However, if the COVID-19 crisis is prolonged and a foreign company has a more permanent employee in Sweden, it may not be deemed exceptional and temporary.

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6 predicted by subparagraph 1 paragraph 1 Article 419 and subparagraph 1 paragraph 1 Article 420 of the TCRF

Turkey

Working remotely from Turkey

A "foreign" company (an employer situated outside of an employee's country) has an employee who should work in the same foreign country (the country where the company is situated). However,

→ Due to the coronavirus, he is working remotely from Turkey
→ Even after the coronavirus crisis he is working from Turkey

1. Tax Implications & Permanent Establishment (PE) Risks

Regardless of the source of income (whether Turkey or abroad),

a) If the employee's length of stay in Turkey is **less than 183 days;**

Taxpayer status → Considering the employee is a foreign citizen; limited.

Turkish citizen taxpayer status should be determined according to DTT.

In the event that there is no applicable DTT; limited.

Turkish income tax liability for employees → In accordance with the most of Turkey's DTTs; provided that the salary is paid by, or on behalf of, an employer who is not a resident of Turkey and if the salary is not borne by a permanent establishment or a fixed base which the employer has in Turkey, the associated salary income is not subject to income tax in Turkey.

According to sub-article 23/14 of the Turkish Income Tax Code, salaries paid in the form of foreign exchange to service staff employed by employers whose legal and business headquarters are not in Turkey and who are subject to limited tax liability on their earnings acquired outside of Turkey, salaries paid to said staff are exempt from Turkish Income Tax.

In all other cases, the salary paid to the employee concerned from Turkish source income is taxable in Turkey, which will necessitate self-declaration (i.e. the filing of annual personal income tax) of generated employment income for the employee.

PE risk for employers → Employees and employees' homes do not create PE risk if they do not have representation & signature authority and they are assigned to perform for the works that are not carried out in Turkey.

Tax implication for employers → None

b) If the employee's length of stay in Turkey is **more than 183 days;**

Taxpayer status → Depending on the provisions of the DTT (if any), the employee might be considered as a full taxpayer.

In the event that there is no applicable DTT; full taxpayer.

As per Article 5 of the Turkish Income Tax Code, foreigners such as businessmen, experts and other individuals whose situations resemble these shall not be considered as settled in Turkey, even if they have remained for more than six months in the country. Accordingly, said foreigners might still be treated as limited liable taxpayers in Turkey.

Turkish income tax liability for employees → The case shall not differ from the same sub-section of abovementioned scenario a), except that the DTT provisions will not be binding.

PE risk for employers → The case shall not differ from the same sub-section of abovementioned scenario a).

Tax implication for employers → None

As per the "OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis" publishing, one might argue that the presence of an employee in Turkey, as per DTT provisions, will not create a PE, as long as the employee is assigned to carry out works that are not carried out in Turkey.

2. Social Security Implications

If the social security contribution payment in the home country and the submission of a relevant copy of the certificate of coverage conditions are met;

a) The employee's country of residence **is a signatory party** of the European Convention on social security or bilateral social security agreement with Turkey;

   Social security implications → Contribution payment to the Turkish Social Security Institution is not necessary.

b) The employee's country of residence **is not a signatory party** of either the European Convention on social security or the bilateral social security agreement with Turkey;

   Social security implications → After an exemption period of 3 months, the provisions of the Turkish social security law will be applicable.

3. Health Insurance Issue

A work permit is not necessary if the employee of a foreign employer is assigned to carry out works that are not carried out in Turkey.

However,

a) If the employee's country of residence has **signed** a bilateral social security agreement with Turkey;

   Social security implications → It should be determined as per the regulations set forth in the bilateral social security agreement.

b) If the employee's country of residence **has not signed** a bilateral social security agreement with Turkey;

Social security implications → The individual will be subject to Turkish social security applications as of the first day following the 3rd month of the employment period.

Furthermore, private health insurance is not obligatory and would be decided upon freely as per the employer's HR policy.

4. Immigration Issue

Foreigners must apply for a residence permit if they need to extend their visa term before its expiry date.

5. Duty of Care to Compensation Levels

Local legislation might only be implemented if the presence of a foreign employee creates a PE or if the employer currently has a PE in Turkey.

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6. Benefits & Payroll

Turkish labour law cannot be implemented unless the foreign employer has a PE in Turkey.

Ukraine

Migration and taxation issues in times of COVID-19

Migration

Governing law

Article 52 of the Ukraine Law "On International Private Law" specifies that employment relations are governed by the law of the country where the employment is actually exercised, unless otherwise set out by the law or respective international treaty. However, the above rule shall not be applicable for expatriates and stateless individuals: (i) working for diplomatic missions of foreign states or missions of international organisations in Ukraine; or (ii) if the employment agreement is concluded with a foreign employer.

Therefore, if a foreign employer has a foreign employee working remotely from Ukraine due to COVID-19, their **employment relations will not be governed by the laws of Ukraine notwithstanding the duration of an employee's stay in Ukraine or the reasons for said remote work.**

Period of stay in Ukraine and liability for breaching migration rules

Foreigners who are citizens of countries with a visa-free entry regime, citizens of visa-free countries, including nationals of EU countries, may temporarily stay in Ukraine for a period not exceeding 90 days during any 180-day period.

Overstaying in Ukraine shall lead to a fine ranging from UAH 1,700 – 5,100 (approximately EUR 51 – 154). A foreigner may face only a written warning if the offence is identified at checkpoints on the state border of Ukraine.

Liberalisation due to COVID-19

Temporarily, **for the period of quarantine in Ukraine and within 30 days after its end,** foreigners and stateless individuals who have overstayed in Ukraine or failed to receive/change a temporary or permanent residence permit, shall be exempt from administrative liability, provided that said breach occurred during or was triggered by quarantine.

Therefore, all foreigners/stateless individuals have at least 30 days after the end of the quarantine period to leave Ukraine or formalise a legal ground for a further stay in Ukraine, with no sanctions being applied.

Taxation

The scope of income taxable in Ukraine depends on the expatriate's tax residence, but at least a Ukrainian-sourced income shall be taxed in Ukraine.

No special rules for defining individual's tax residence were introduced in Ukraine due to the lockdown.

The expatriate's duration of stay in Ukraine is not a main criterion for defining tax residence. The 183-day criterion is used only if an individual fails to confirm having a place of residence, domicile, or a centre of vital interests in any other country.

Also, an individual's actual presence in Ukraine does not instantly mean that the income received is Ukrainian-sourced. A number of criteria are to be regarded to define whether income originates from Ukraine and from what kind of activity it was gained.

Thus, notwithstanding the coronavirus crisis, the matter of expatriate taxation in Ukraine is still subject to a case-by-case study.

Furthermore, an expatriate's income might be exempt from taxation in Ukraine under the provisions of a Double Tax Treaty (DTT) (if any), also subject to analysis on the case basis.

The **OECD, in April 2020,** brought the issues of cross-border working that arose due to the lockdown into the spotlight; however, leaving their resolution to each country's discretion.

So far, no amendments have been made to Ukraine's DTTs due to the coronavirus crisis and, to our knowledge, no information on negotiations with other countries on the matter has been made public.

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Vietnam

Does having an employee in Vietnam create a permanent establishment?

The case: German company A employs person B with residence in Vietnam for working on projects of A in Germany and other countries. A is not registered in Vietnam. A and B intended that B will be working for A in Germany, but this plan cannot be implemented due to COVID-19 restrictions. After these restrictions are lifted, B remains in Vietnam. B does not have an independent business in Vietnam, he is employee.

Personal Income Tax (PIT) of B

A and B are both responsible for paying PIT on the income of B in Vietnam. Because B is tax-resident of Vietnam, he is taxed with the progressive rate of up to 35%. A cannot fulfil the obligation for paying PIT to the state budget directly because A is not registered in Vietnam and does not have his own tax code. PIT therefore is to be declared directly under B's tax code. PIT declarations are due at the end of the month following the quarter for which PIT must be declared. B must file a PIT finalisation after the end of the tax year and no later than at the end of the 3rd month after end of the tax year. The employment contract must be registered for social insurance which B must pay under a special regime.

Corporate Income Tax (CIT) of A

According to Article 2 of the law on CIT, A must pay CIT in Vietnam on income arising anywhere in the world if this is related to the operations of a Permanent Establishment **(PE)** in Vietnam. So, if the work of B is to be considered as having triggered a PE of A in Vietnam, the income from all projects of A in which B is involved would be taxable in Vietnam.

A PE is established in Vietnam, if A has a fixed place in Vietnam through which it is carrying out business. B's place of work can be considered as such fixed place. This can be an office or also a so-called home office. If B's work can be considered as part of a service provided under A's contracts with third parties, A would be using the fixed place in Vietnam for providing these services. However, a PE in this case would only be established if the provision of services exceed a period of 183 days in each 12-month period.

If a PE is established, Value Added Tax **(VAT)** must also be paid.

Tax would be calculated and paid under the regime of the Foreign Contractor Withholding Tax **(FCWT)**. That is not a special tax, but a withholding mechanism for paying the VAT and CIT of the foreign contractor. Different tax rates are applicable for different types of business. For general services, the rates are 5% FCWT-VAT and 5% FCWT-CIT. From the invoiced amount, firstly the VAT and then the CIT must be deducted.

To avoid such surprising and unwanted taxation, a careful planning for implementing the agreement between A and B is required. It might be beneficial to have B employed at a company registered in Vietnam and have A agree with that company on exporting the related services from Vietnam to A. In that case, A would not have to pay VAT or CIT. The PIT would have to be handled by the employing Vietnamese company.

This general view is not in any way relieved related to the COVID-19 situation.

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