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## **Cross Border Benefits Alliance – Europe (CBBA-Europe) Position Paper on Remote Work and Cross-Countries Issues**

### **CBBA-Europe Mission:**

The Cross Border Benefits Alliance Europe (CBBA-Europe) is a Brussels-based advocacy group with a mission to have a more integrated EU and make it a truly great space of freedom and circulation for workers and employee benefit services as well as a hallmark of robust employee benefits coverage. We promote and support improved employee benefit solutions across Europe, bringing together the private sector, EU institutions and national authorities.

To do so, we monitor the EU ongoing policy initiatives and legislation, we collect input from our members via working groups, we draft position papers and prepare reports to submit to decision makers, making us a constructive and influential interlocutor representing the needs of all employee benefits actors in Europe.

Moreover, we host local national conferences as well as an annual conference in Brussels to discuss with all actors' best practices as well as obstacles in administering and deploying employee benefit solutions. We share latest trends, how different actors approach employee benefit solutions as well as common issues encountered that could be improved with changes to legislation.

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## Introduction

In recent years, global mobility has evolved with the Covid crisis and new forms of mobility have emerged, in particular remote working. This is not without consequences for companies, which are trying to adapt their ways of working and their practices to answer these new employees' expectations with legal constraints and challenges raised with the recent developments of remote working.

Remote working has developed across the European Union in an increasingly, albeit uneven, way and we believe will remain a new model of working post Covid crisis, to be consolidated among organizations and workers.

Despite the lack of a shared definition, the term "remote work" can be considered as a situation in which the work is fully or partly carried out at an alternative workplace than the default place of work. For example, work performed in an EU country different from the country where the employer is based.

This model of working has some overlap with "telework" but the real difference is the opportunity to have a "hybrid" model where the work could be performed anywhere and anytime.

This new model has many advantages both for employer and employee, such as better talent acquisition and retention, improved work life balance including collateral benefits for the environment and local communities, cost containment and addressing business needs in terms of global project management.

Despite the benefits, cross-border remote work triggers various issues to be considered, among which:

- a) permanent establishment risks for the employer
- b) individual income taxes
- c) the applicable law to employment contracts
- d) payment of social security contributions and accrual of pension benefits

a healthy and safe environment to work in, from different perspectives, including also mental health. We focus our attention on the applicable law, social security and health and safety issues as we think the EU Commission and appropriate EU institutions can play a significant role in improving employment conditions and ease the remote work model.

## Section 1: The applicable law to employment contracts

The question of the determination of the applicable law to an international contract of employment is usually covered by:

- EU Regulations (ROME I) and international agreements where applicable (depending on countries and employees involved);
- Domestic law and jurisprudence when international agreements do not apply.

The principle is usually the parties' broad freedom to choose applicable law particularly for contractual matters.

In any case, it is required that the law chosen by the parties applies subject to public policy and minimum statutory provisions of the country where work is performed.

Remote workers under an employment contract with a foreign employer could therefore be subject to the law chosen contractually by the parties, subject however to mandatory rules that may be applicable in the country where the professional activity is carried out, i.e., mainly in their place of work/country of residence.

In this respect it may be difficult for foreign employers to be aware of and comply with minimum statutory rules that may be applicable within EU member states (i.e. maximum working time, statutory paid leaves, minimum salary if any, specific requirements for remote workers like any pre-authorization to be requested to a labor office, specific compensation to be granted, and any other specific terms and compulsory conditions).

Our suggestion is:

- ✓ To make available on an online platform at the European or EU member state level the list of minimum statutory provisions applicable to remote workers to which foreign employers must comply.

## Section 2: Payment of social security contributions and accrual of pension benefits

The basic reference for social security matters, within the European Union, the European Economic Area (EEA) and Switzerland, is EU Regulation no. 883/2004 and the subsequent EU Regulation no. 987/2009.

In addition, we should mention the recent "Framework Agreement on the application of Article 16.1 of Regulation No 883 2004 in cases of habitual cross border telework". By now, there are 22 signatory States, and we encourage the appropriate institutions to ensure ever-wider participation by the Member States.

## 2. a) Ordinary criteria on applicable legislation

The Framework Agreement introduces a further derogation from the ordinary criteria on applicable legislation, allowing the worker who carries out, in the country in which they reside, activities in remote working mode for less than 50% of the total, to maintain the social security position of the country in which the employer is based.

This derogation, which is part of the exception procedure referred to in art.16 of the EU Regulation 883/2004, remains in any case a choice for the worker, who therefore has the possibility of using the ordinary criteria on applicable legislation provided for by the same Regulation.

The Framework agreement only applies to cross border remote workers, working remotely in two countries (the country of the employee's residence and the country where the employer is based). This threshold therefore only applies to cross border between states that have signed the framework agreement.

In all other situations of remote working, main provisions of the EU regulations 883/2004 would apply with a threshold set at 25% of working time applicable to all other situations of remote work and pluri-activity within the EU to determine the applicable social security scheme.

In this context, there is a lack of harmonized threshold in terms of social security rules and even more a lack of harmonization with threshold applicable from a tax perspective.

From a tax perspective, the applicable rule varies according to double tax treaties and specific bilateral agreements between countries, if any, for cross-border remote workers. For this population, a rule seems to be emerging in practice for a threshold of 40% above which teleworking may have an impact on tax treatment.

In practice companies must navigate between applicable rules and either refer to the applicable tax threshold to limit teleworking to 40% of working time - without using the flexibility of the framework agreement up to 49.99% of teleworking allowed – or, outside the scope of specific framework agreement, must limit telework to 25% of working time as set by EU regulations 883/2004, irrespective of the ceiling that may be applicable for tax purposes.

These differences of thresholds and applicable rules are not in favor of an equitable treatment among employees within a company and can lead to indirect discrimination based on nationality, given that employees often ask to carry out a form of teleworking in their country of origin.

Our suggestion is:

- ✓ To harmonize the social and tax threshold for cross-border in terms of teleworking days tolerated without changing the applicable social and tax scheme.

## 2. b) Social coverage and benefits: Accrual of pension benefits

Given the possibility of working and contributing in countries other than their country of origin, the cases of EU citizens with social security payments to different systems will increase in the years to come.

In such cases, the above-mentioned EU regulations allow the so-called totalization of insurance periods; however, coordination only applies in principle to the basic statutory scheme (1<sup>st</sup> pillar). Occupational pension schemes (2<sup>nd</sup> pillar) are usually excluded from the material scope of totalization and coordination agreements set force by the EU Regulations (883/2004 & 987/2009).

Accordingly, when a company has to comply and to contribute abroad in a country where remote workers are employed and may have their residence and work over the applicable threshold, this company should register as a foreign employer and comply and pay contributions only to the statutory social security scheme applicable in this country. This would allow the possibility for the company to keep and extend the benefit of the current occupational pension plan / international pension plan already in place for local employees or traditional expats, to remote workers working overseas, ensuring an equity of treatment and coverage among all employees of a same company.

However, in some countries, foreign employers also have to comply and contribute to a supplementary scheme or even set up a local occupational pension plan, for a few employees only working remotely in their country of residence. For instance, in the UK, auto-enrolment regulations require foreign employers to enroll eligible remote workers into a suitable local workplace pension scheme irrespective of existing foreign pension plans (tax qualified or not). In Italy there are specific requirements in terms of enrolment in addition to the INPS for Dirigenti to supplementary defined contribution plans (i.e. Previdai and FASI in Industry field).

Such requirements may have no beneficial effect even for the employee where supplementary insurances and pension schemes already exist in the country of the relevant company office with equivalent or even more comprehensive coverage. Setting up such an occupational pension scheme just for a single or very few employees in another country may also be an extra cost, without beneficial effects: it could lead to double payment of contributions for a same risk and does not allow harmonizing of insurances.

An exemption from contributions to local supplementary pension schemes (2<sup>nd</sup> pillar) should be possible where sufficient pension provision exists abroad for remote workers.

This would ensure fair treatment of employees within the company, regardless of their country of origin, country of residence (indirect discrimination based on the nationality as remote workers often request to work in their country of origin). This would also provide for better social coverage for employees who may keep the benefit of a more comprehensive pension plan or supplementary insurances. This would also allow pooling of insurance for the company and avoid double payment of contributions for a same risk as the company

may also be required to keep same measures and benefits for all its employees including remote workers working overseas.

Such a formal exemption already exists under specific conditions in some countries like in France and in Switzerland, provided that conditions are met, and sufficient benefits are provided abroad.

We also believe that measures can be adopted to improve citizens' awareness, accessibility to the necessary documentation and provide better tools for cooperation between Member State authorities.

Our suggestion is:

- ✓ To allow a formal exemption from contributions to local supplementary pension schemes (2<sup>nd</sup> pillar) in the country of residence of remote workers where sufficient pension provision exists and are provided abroad at least equivalent to the one applicable in the country of residence of the foreign employer.
- ✓ To guarantee, for every EU citizen, access through a single European portal, to the different social security positions accrued during the working periods in different Member States including an estimate of pension benefits.

## 2. c) Complex administrative burden of social security registration for foreign employers

Another complex administrative burden is the social security registration for employers, obliged to pay such contributions in a Member State where they don't have any permanent establishment. This is the most common case for remote workers.

The procedures usually require an initial request for a tax number and then registration of the foreign company with the social security institutions. The formalities, information and documents required are not the same, and the social institutions in certain countries even request the opening of a local bank account as payments can only be made from a bank account existing in the country for tax and social liabilities. The registration process can take several months in practice and requires the support of external service providers in order to comply in the absence of local entities.

We experienced very different procedures among States in terms of processes, formalities and documentation needed and we propose to simplify the processes and recognition of public documentation issued by a Member State.

We suggest:

- ✓ A comparison of different procedures and documentation to streamline the process, reducing the time to hire or to move an employee towards the remote work model.

## 2. d) Duty of care, Health & Safety

In addition to the above issues, we suggest:

- ✓ To define common rules in the field of health and safety that simplify compliance with local regulations by the different EU countries aimed at covering not only the minimum safeguards as it relates to work environment to which the employer should comply while an employee is teleworking but also coordination with mandatory insurance coverage among states.
- ✓ To guarantee measures for monitoring and protecting mental health for remote workers such as right to disconnect (linked to working time regulations), proper access to employees' rights (eg EU Directive 2019/1152, Directive 2002/14/EC) and fostering the provision of wellbeing benefits.

Last, we would like to bring attention to the creation of accessible co-working spaces in public areas, recovering public facilities, especially in peripheral contexts, to facilitate the connection between people from the same company and from different companies and to promote the economic development of these territories. This would increase the possibility of applying remote work in those urban contexts where remote work is working from home on an occasional basis but often limited due to the lack of adequate spaces.

We therefore suggest providing specific initiatives and funds for such initiatives.

## Summary of Key Recommendations

We have provided our position on the various complex issues employers and employees must deal with related to remote work contracts. A summary of our proposed recommendations developed in this paper are listed below:

1. To make available on an online platform at the European or EU member state level the list of minimum statutory provisions applicable to remote workers to which foreign employers must comply.
2. To harmonize the social and tax threshold for cross-border in terms of teleworking days tolerated without changing the applicable social and tax scheme.
3. To allow a formal exemption from contributions to local supplementary pension schemes (2<sup>nd</sup> pillar) in the country of residence of remote workers where sufficient pension provision exists and are provided abroad at least equivalent to the one applicable in the country of the relevant company office.
4. To guarantee, for every EU citizen, access through a single European portal, to the different social security records including an estimate of pension benefits.
5. To establish a single procedure and set of documentation to streamline the registration of the foreign employer/entity for social security purposes.



6. To define common rules in the field of health and safety that simplify compliance with local regulations in the different EU countries, including minimum safeguards in the teleworking work environment and coordination with mandatory insurance coverage among states.
7. To guarantee measures for monitoring and protecting mental health for remote workers such as right to disconnect (linked to working time regulations), proper access to employees' rights (eg EU Directive 2019/1152, Directive 2002/14/EC) and fostering the provision of wellbeing benefits.
8. To encourage the creation of accessible and appropriate co-working spaces in public areas, recovering public facilities, especially in peripheral contexts, to facilitate the connection between people from the same company and from different companies and to promote the economic development of these territories.

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