

GENEVA BASED TAX LAW FIRM

BOITELLE **B** TAX **T**



Remote Working : A Closer Look at Tax and Social Security Aspects

TTN PARIS TAX CONFERENCE
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Who are we?

Boitelle Tax is a **Geneva-based tax law firm** offering Swiss and international tax services to both corporate and private clients. We operate in a multicultural, multilingual and international context.

We assist a broad range of clients on a daily basis and distinguish ourselves by the quality of the services we provide and by our personal and direct involvement in each case.

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Agenda

1. Introduction
2. **Employee tax and social security aspects of telework:**
 - a. Tax residency issue
 - b. Income tax issue
 - c. Social security issue
3. **Employer tax aspects of telework:**
 - a. Corporate tax issues
 - b. Corporate residence issues
 - c. Permanent establishment (PE) issue
4. **Aspects of telework for self-employed person**
5. **Case studies**

Introduction



Evolving landscape of remote work:

COVID-19 pandemic and **increased digitalization** as a game-changer for **remote work**. Digital nomads and teleworkers, once exotics, have now become mainstream trends in the modern workforce.

Shifting stance observed in 2023:

spurred by U.S. tech leaders (e.g., Google, Zoom), numerous multinationals have adjusted their remote work policies, often restricting its scope. One of the driving factor is the challenges of tax regulations and social obligations, amplified in cross-border contexts.

Switzerland in the spotlight:

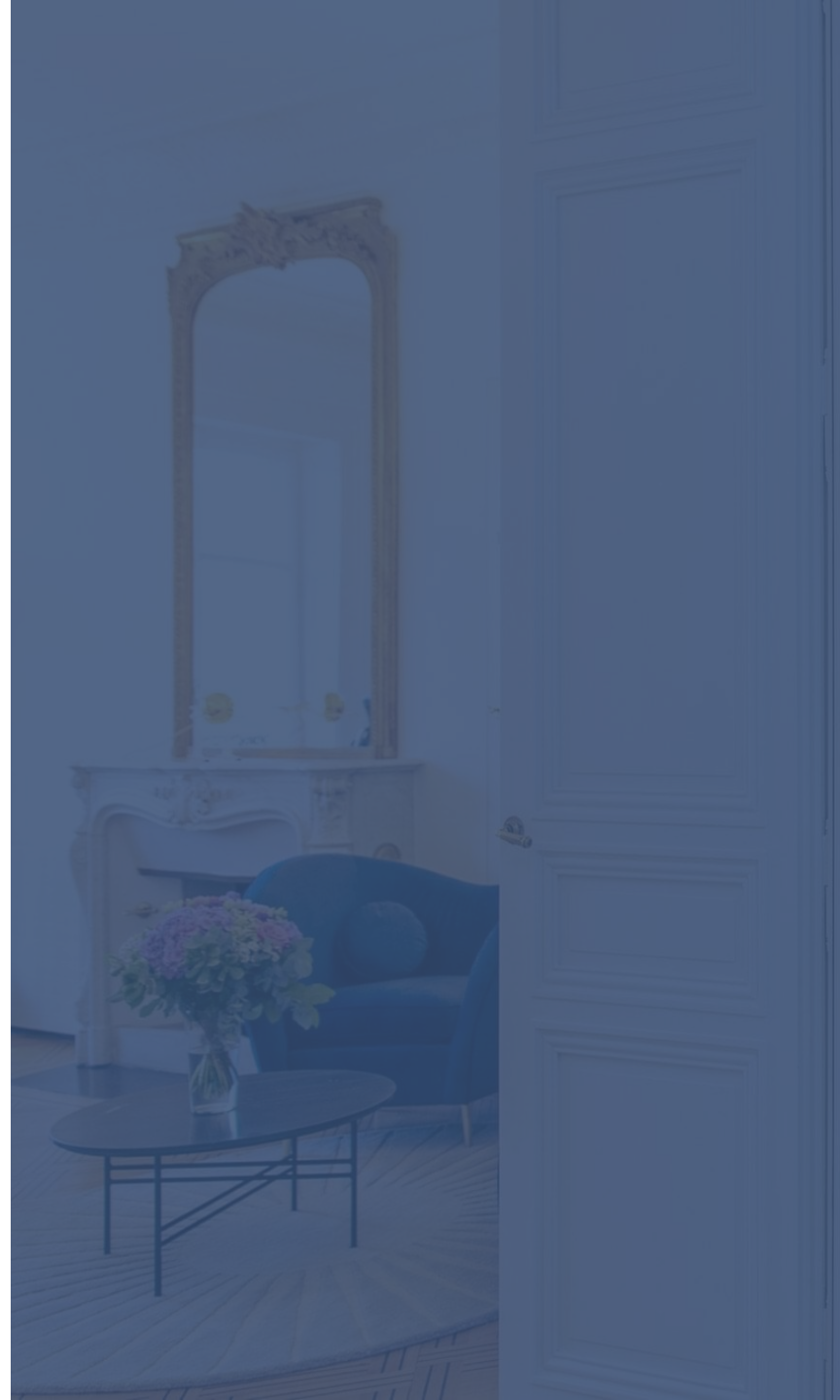
Switzerland's position, bordered by five countries and its significant count of cross-border workers, presents distinct tax challenges for remote employment. Embracing remote work is paramount for sustaining the allure of the Swiss job market.

Switzerland's approach : hybrid work model, where most companies in the services industry implement 1-2 teleworking days per week as standard.

Number of Swiss cross-border workers predicted to double in the next 10 years. Most Swiss cross-border workers reside in France (214,235 in 2022).

Definition of telework in CH

- In 2016, the Federal Council defined telework as *"remote work carried out using telecommunications means, which can also be performed within the organization's premises, typically on a regular basis"* (Report on the legal implications of telework).
- This broad definition does not necessitate an employment relationship but describes the framework in which a specific service is rendered. Hence, self-employed individuals can also engage in telework (e.g., digital nomads).
- Telework within the context of an employment contract should be distinguished from home-based work, which is governed by specific provisions in the Swiss Code of Obligations.
- By default, there is no inherent right to telework in Switzerland. Performing telework requires mutual agreement between both parties.





EMPLOYEE TAX & SOCIAL SECURITY ASPECTS

I.1

Overview of Swiss tax rules (theory)

- ❑ Residency as the determining factor for **tax liability**:
 - **Residents** : subject to income/wealth tax on worldwide income/assets (except foreign real estate / PE / businesses).
 - **Non-residents**: taxed only on income/wealth derived from Swiss sources.
- ❑ **Concept of tax residency** – Individuals are deemed tax residents if (art. 3 DFTA):
 - Their tax domicile is located in CH, primarily determined by their personal and economic ties to the country (i.e., where their vital interests are centered).
 - **Stay** of a minimum of **30 days** (with gainful activity), or **90 days** (without gainful activity), regardless of short interruptions

I.2

Tax residency issue

Key issue: remote work from a jurisdiction different from the employee's foreign home country can initiate **tax residency** implications in Switzerland

Example: a digital nomad working remotely more than 30 consecutive days from his chalet in Zermatt (CH) while being a resident of the UK, potentially triggering Swiss tax residency → leading to a potential risk of double taxation



+100 DTAs concluded by Switzerland; most of them are based on article 4 M-OECD : **tie-breaker rules** with four successive criteria:

- (i) permanent home available
- (ii) center of vital interests
- (iii) habitual abode
- (iv) nationality

I.2

Income tax issue

Key issue:

determining the primary right to tax wages in cross-border remote work situations

- ❑ **Residency status of weekly/daily commuters working in CH:** remain residents in their home country if they return daily or at least once a week

- ❑ **Tax treatment of weekly/daily commuter working in CH:**
 - Swiss income tax levied only on days worked in Switzerland (requires physical and effective activity on Swiss territory);
 - Tax collection: Swiss employers levy income tax through withholding tax (WHT)

I.2

Income tax issue

Most DTA-based tax treatment for commuters working in Switzerland provide

- ❑ **General Rule:** Employment income taxable in the state where the activity is actually physically performed (Article 15.1 – MOCDE).
 - Commuters working in CH are generally taxed in CH, except if they effectively perform works outside the country.

- ❑ **Exception :** Taxation in the employee's country of residence if the following three cumulative conditions are met (Article 15.2 – MOCDE):
 - Employee's presence in CH does not exceed 183 days in any 12-month period ;
 - Income is paid by an employer not residing in Switzerland;
 - Remuneration is not born by a PE of the employer in Switzerland

- ❑ **Taxation of board members:** taxed in the country where the legal entity is resident, irrespective of the board member's tax residency (article 16 – MOCDE)

I.3

Examination of agreements with neighboring countries

Situation with France



PRE-COVID19

COVID19

POST COVID19

❑ **1966** : CH-FR DTA (applicable to the cantons that are not part of the 1983 agreement on taxation of cross-border workers)

- Employment income taxable **in the state where the activity** is actually exercised (Article 15.1)

❑ **1973** : FR-GE Agreement (Specific agreement with Geneva)

- Applies to French **cross-border workers in Geneva**
- Income taxable where employment services are performed
- Compensation : 3.5% of aggregate tax revenue to France

❑ **1983**: Agreement for cross-border workers status (Taxation of cross-border workers)

- Applies to 8 cantons (BS, BL, BE, JU, NE, SO, VD, VS)
- France **competent to taxes wages**,
- Compensation : 4.5% of gross tax revenue as compensation to the canton of employment

❑ **May 2020 – Dec 2022** Temporary agreements

- Addressed the tax effect of remote work for French residents with Swiss-based employers
- **Income exclusively taxed in Switzerland**, even when services performed in France
- Exemption from French income tax for remote work during the agreement period

❑ **Signed on 27 June, 2023**: CH-FR DTA amendment

- Introduction of a tolerance threshold effective from 1st January 2023 : **Max. 40% of the workweek** can be performed remotely in France
- Same compensation with Geneva
- **Pending ratification**

I.3

Examination of agreements with neighboring countries



Amendment to the CH-FR DTA signed on 27 June 2023 (pending ratification)  

- Scope** : Addresses the tax treatment of telework income earned by employees not covered by the 1983 cross-border agreement. This includes cross-border workers under the DTA, such as those employed in Geneva.

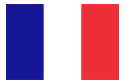
- Key provisions:**
 - **Telework threshold:** Telework from an employee's residence can account for up to **40% of annual working hours** without depriving the employer's state of its taxation rights. In exchange, the employee's state of residence receives financial compensation (4.5% with Geneva).

 - **Automatic exchange of information** on specific wage data for all cross-border teleworkers. This includes identity, the tax year the income is earned, number or percentage of teleworking days, and the total remuneration paid.

1.3

Examination of agreements with neighboring countries

Amendment to the CH-FR DTA signed on 27 June 2023 (pending ratification)



❑ Other provisions :

- Introduction of a telework definition
- Tolerance measure: allows cross-border workers to **work up to 10 days annually within third countries** or as part of business trips.

❑ If telework exceeds 40% threshold :

- France has the right to tax all the days teleworked in France: CH employer is required to deduct tax at source in France. CH and FR have not agreed to a tax collection procedure → special authorization must be obtained in order to collect and pay the tax of a foreign jurisdiction without violating Swiss law (article 271 of the Swiss Penal Code).
- Workers lose special status as quasi-residents (allowing tax deductions in CH).

1.3

Examination of agreements with neighboring countries

Situation with Italy



- ❑ **On April 20, 2023, Bern and Rome reached a tentative agreement**, set as pending until Italy established the legal foundation required to remove Switzerland from its "blacklist" of tax havens.
- ❑ **New Provisional Agreement – May 31, 2023: This agreement ratified Switzerland's removal from Italy's tax haven blacklist** → Income of cross-border workers residing in Italy and working in Switzerland is taxed in Switzerland.
- ❑ In exchange, Swiss border cantons (Graubünden, Ticino, Valais) compensate Italian border towns, with a compensation amounting to 40% of the total tax income. This arrangement **lasts until December 31, 2033**.

1.3

Examination of agreements with neighboring countries

Situation with Germany



- ❑ **No specific regulations** established following the COVID-2019 pandemic.
- ❑ According to the Swiss-German DTA, cross-border workers are taxed in their country of residence (Article 15a). As compensation, the State in which the activity is performed may also tax, at a capped rate of 4.5%.
- ❑ The DTA defines a **cross-border commuter** as an individual who resides in one country but works in the other, and consistently travels back to their residence after work. Commuter status forfeited if the person stays away from home for over 60 days in a year.
- ❑ If one doesn't meet the criteria for cross-border commuter status, the taxation on their employment income in Switzerland isn't restricted to 4.5%. In such cases, Germany must exempt the income taxed in Switzerland from its own income tax.

I.4

Social security issue



- ❑ **EU-Swiss relations:** Social security matters governed by EU coordination regulations 883/2004 of 29 April 2004:
 - **Principle of applicability of single system:** employees participate in and contribute to only one social security system
 - **General rules:**
 - Employee residing in one Member State and working exclusively in another Member State participates in the social security system of the State where the employer is located
 - Substantial activity in the State of residence (+25%): State of residence's social security system exclusively applies
- ❑ **Employees outside EU:** bilateral treaties apply with rules governing coverage (or not)

I.4

Social security issue



- ❑ **From July 1, 2023** : a new framework agreement on social security for cross-border telework took effect, providing an opt-in to employers and employees to maintain social security coverage in the country of the employer when an employee works from home in another country for less than **50% (i.e up to 49.99%)**, instead of 25%).

Are not covered :

- Individuals who engage in other activities (e.g., secondary self-employment) in their home country, even if that country is a signatory of the multilateral agreement.
- Individuals who, besides teleworking in their residence country, also work in a third country.
- Individuals employed by multiple employers.
- Self-employed individuals.

19 countries have signed the agreement so far, including Switzerland and France. Italy has not yet signed.

Please note that the threshold (50%) is not aligned with the tax-related threshold, which is set at 40%!



EMPLOYER TAX & SOCIAL SECURITY ASPECTS

II.1 Permanent Establishment (PE) issues

❑ PE under Swiss tax law – Article 51 DFTA:

- (i) a fixed place of business
- (ii) which is wholly or partly engaged in the business activities of an enterprise

❑ Swiss Tax Conference (CSI) on PE & remote work in intercantonal context (CSI statement 27 April 2022):

- A PE needs designated space within the enterprise's control.
- Typically, an employee's home is not considered a PE as it is not under the employer's control.
- Having multiple employees in one canton doesn't aggregate to create a PE; each activity location must individually qualify.
- A company may establish a PE in another canton via assigned employees. If a company only occasionally rents spaces without maintaining a constant office, the location lacks "permanence". Such locations aren't typically considered PEs for Swiss intercantonal tax reasons.

II.2 PE issues

In international context – Article 5 OECD MTC

Physical PE is not deemed to exist if:

- (i) the home office is used intermittently,
- (ii) the foreign company did not require the home to be used for business purposes,
- (iii) the foreign company does not have full access rights to the employee's private premises used for work, or
- (iv) Activities at the home office are purely auxiliary in nature.

An agent PE does not exist if the employee lacks the authority to finalize contracts. However, the exact nature of contracts and business operations must be considered.

Some countries (France, for instance) have a very broad interpretation of the concept of PE: a role in the conclusion of contracts (sales activities) is sufficient to qualify as agent PE, even without power of signature (while Switzerland typically focuses on where the contract is finalized).

Possible solution to limit the risk: seek a ruling on negative PE

New challenges with the updated OECD definition of PE?

II.3

Effective management and corporate tax residency

❑ Swiss Tax Conference's View:

- For larger firms, home-based work by management doesn't shift effective management.
- For smaller entities, if a single executive handles operations, the company's management may be considered at that individual's home, given certain conditions.

❑ OECD Guidance:

- During pandemic: no tax residency implications for remote work during exceptional periods like pandemics.
- Post-pandemic: If major decision-makers work from various countries, it could unintentionally alter tax residency based on management location.

- **Remote work may require adjustments in cost and profit allocations** between countries. If employees in low-cost regions provide significant value for entities in high-cost regions, transfer pricing adjustments may be necessary for arm's length compliance.

An aerial photograph of a city, likely Seattle, with a large, semi-transparent brown circle overlaid in the center. The text is centered within this circle.

SELF - EMPLOYED TAX & SOCIAL SECURITY ASPECTS

III.1

Taxation of Independent

- **Basis:** if an independent professional has a permanent establishment in another country, the income linked to this establishment will be taxable there (Article 14 OECD MTC removed in 2007, now covered under Article 7 OECD MTC regarding business profits).
 - **Key points:**
 - Telework-specific tax agreements concluded in Switzerland do not apply.
 - Independent workers inherently carry a **higher risk of PE creation** abroad due to:
 - Being the sole representative of their business.
 - Holding all decision-making powers, both strategic and operational.
 - Merging various roles like contract negotiation, sales closure, and customer management at a singular location.
- Teleworking from their residence country, regardless of the frequency, is likely to result in the creation of a permanent establishment, requiring appropriate profit allocation.

III.2

Social scheme for independent

- **Basic rule:** An independent worker is governed by the social legislation of the country where they conduct their independent activity (EU coordination regulations 883/2004 of 29 April 2004).
- **Pluriactivity:** If the worker operates in multiple member countries, they fall under the social legislation of their residence country. This applies if they carry out a substantial part (25%) of their activity there. European agreements raising the threshold to 49.99% do not apply to non-salaried activities.
- In situations where states have conflicting views on whether an activity is salaried or not, the Regulation gives precedence to **legislation of the state where the activity is conducted.**

CASE STUDIES

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Case Study

I. The « Optitax » Family

□ Facts

Mr. Optitax lives in France (Annemasse) with his wife and their two children. Previously, he was employed by a multinational corporation in Geneva as a consultant. While Mr. had aspirations of going independent, he was apprehensive about fully diving into it.

Mr. Optitax has just landed a consulting contract with a company based in the UAE. This company prefers to avoid administrative hassles in Switzerland and has no intention of establishing a permanent presence there.

Instead of providing Mr. Optitax with a regular salary, they offer him a consulting contract, with the possibility to work from anywhere. Mr. Optitax would like to keep his main activity in Geneva (essentially to maintain his Swiss social security affiliation).

Given the circumstances, what would be the most compliant and optimal structure for him to operate under?

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Case Study

I. The « Optitax » Family

□ Solution

1. Sole proprietorship in Switzerland

Taxation Regime

Income from a freelance profession by a resident of a contracting state is taxable only in that state unless a fixed base in another contracting state is regularly available. If such a base exists, only the income attributable to that fixed base is taxed in the other state. (article 16 FR-CH DTA).

→ Mr. Optitax's independent activity profit will be taxed in Switzerland if it is genuinely conducted there (in a dedicated office). Conversely, if he has a dedicated office in France and conducts significant activities from there, he will be taxed in France. In such case, profits must be allocated to each permanent establishment, with France and Switzerland having jurisdiction to tax their respective shares.

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Case Study

I. The « Optitax » Family

Social Security Aspects: Mr. Optitax will be affiliated with the Swiss social security scheme unless he conducts a significant activity (+25%) in France.

Challenges:

- Activity classification as 'independent' or 'salaried' doesn't rely on the contractual relationship but on the specific economic circumstances. Typically, a worker is deemed an employee if economically/organizationally dependent on an employer and doesn't bear entrepreneurial risks. Evidence of commencement and having at least three clients are prerequisites.
- The authorities are stringent and monitor to prevent covert employment contracts.

In the present case, it will be challenging to obtain approval for an independent activity.

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Case Study

I. The « Optitax » Family

2. Swiss company in Switzerland with an employment contract

- More suitable to circumvent issues related to the status of an independent contractor. The individual would be an employee of his own company and taxed at source in Switzerland.
- Possibility to work remotely from France under the CH-FR DTA (up to 40%), minimizing the risk of creating a PE in the country. However, it's essential to clearly differentiate tasks and only perform administrative and consulting tasks in France, excluding prospecting and sales activities.
- Note: a Swiss company must have at least one director residing in Switzerland. In this scenario, Mr. Optitax would need to appoint a trusted person / professional to co-represent the company, leading to additional management costs.

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Case Study

II. French lawyer seconded to Zurich

□ Facts

Jules is a brilliant associate lawyer in an international law firm based in Paris.

He is considering relocating to Zurich with his wife, who is being seconded to Zurich by her French employer for a duration of 24 months.

Given the firm's high satisfaction with Jules' collaboration, they are keen on providing him with the best possible conditions to continue working for them during his stay in Zurich and then return to Paris at the end of his wife's 24-month assignment.

The firm doesn't have a presence in Zurich, but they do have an office in Geneva.

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Case Study

II. French lawyer seconded to Zurich

□ Considerations for Jules

1. Sole proprietorship in Zurich

- Possible if Jules can prove engagement with at least 3 different clients.
- Presumption: Jules genuinely works as a collaborator in France, generating personal revenue in Paris with multiple clients.
- Under this scenario, Jules can invoice his French law firm directly. The income would then be taxed in Zurich.
- Social security: Jules may use self-detachment (limited to 24 months).

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Case Study

II. French lawyer seconded to Zurich

2. Setting up a company in Zurich

- Avoids independent status complications
- Increases administrative and financial costs (can be re-invoiced to the French law firm).
- Dual taxation ensues: corporate tax in Zurich (19.65%), followed by tax on salaries and/or dividends (with a 50% abatement). Note: Swiss compensation funds mandate a minimum salary, subject to Swiss social charges.

Further Considerations

To optimize corporate tax rates, Jules might consider setting up his company in Zug (12% corporate tax) and teleworking from Zurich. However, as per the CSI's statement, there is a risk of PE in Zurich, especially if he is the sole shareholder, influencing his home office's power → **Seek a ruling in Zurich to ensure no PE risk.**

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Case Study

II. French lawyer seconded to Zurich

3. Employment contract with the Geneva branch of the law firm

Jules signs a fixed-term 2-year contract with the Geneva branch of the Parisian law firm. He then works for the Geneva firm from Zurich → Salary taxed in Zurich.

A Zurich ruling is advised to confirm the absence of PE risk (lower risk in this scenario as per the Swiss Tax Conference statement).

For scenario 2 and 3: to maintain his rights in France, he can request voluntary registration in France while he must pay social security in Switzerland. He could try to ask for a LaMal (medical insurance) exemption.

Note: Switzerland likely to consider him as an employee instead of an independent according to its domestic law



THANK YOU



CONTACT US

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