

ETUC's recommendations to the national governments and to the European Union on how to overcome obstacles to the mobility of frontier workers in Europe

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Summary

While not representing a significant part of the EU labour market (no more than 1.2 million, according to the European Commission), frontier workers bring an important contribution to the economy of several Member States, but they experience particular problems limiting their right to free movement across the borders.

Although it is possible to identify frontier workers quite easily, the 'de jure' definition is a far more complex problem. There is no single definition of frontier work at present that is unanimously accepted in legislative texts, which covers particularly sensitive matters for this type of employment.

Frontier workers are faced with the same obstacles to movement that concern other mobile workers, but they are also affected by specific discrimination linked to the fact that they work in a country and reside in another one.

There are four areas likely to constitute obstacles specific to the free movement of frontier workers: social security and social advantages; direct taxation and tax advantages; labour legislation; regulations concerning entry and stay of third country nationals.

Convinced of the need to guarantee the equality of treatment for all workers on the different employment markets, irrespective of their nationality and place of residence, the ETUC considers that frontier work must be ensured without unreasonable or unjustified restrictions.

For these reasons, with a view to removing the obstacles frontier workers have to face, the ETUC addresses the following recommendations to the national governments and to the European Union.

Context

Frontier work (also known as cross-border or commuting work) is an important reality in the European labour market.

Frontier work in Europe today concerns workers who are entitled to freedom of movement, and:

- Reside in an EU or EEA country or in Switzerland, but are employed in bordering or neighbouring countries of the EU; in bordering countries of the European Economic Area – EEA, specifically Norway and Lichtenstein; in countries that have signed agreements for the free movement of people with the EU and its Member States, specifically Switzerland; in countries that have signed other types of agreement for free movement of people with bordering or neighbouring countries of the EU, specifically Andorra, Monaco, San Marino, Vatican City;

- Workers from third countries, who reside in third countries but are employed in bordering or neighbouring EU countries, mainly Finland, Estonia, Latvia, Lithuania, Poland, Slovakia, Hungary, Romania, Bulgaria, Greece, Croatia and Spain; and in neighbouring EEA, specifically Norway.

While not representing a relevant part of the European labour market (no more than 1.2 million into the EU, according to the European Commission), frontier workers bring significant contribution to the economy of several EU Member States, but also of some not-EU countries (Switzerland, San Marino, etc.).

It is difficult to determine reliable figures about frontier workers in Europe. This is because they are not obliged to register in the country where they work due to the fact that they don't stay in the country for more than three months continuously, as is the case for other mobile EU citizens. On the other hand, because many countries lack a complete legislative framework that takes account of their specific condition, frontier workers have difficulties establishing regular labour relations in the country of employment. They are therefore very often relegated to undeclared work, and become "invisible" in the official statistics.

Finally, it is possible to identify de facto frontier worker as:

- **A person who works in one country and returns to another country, where he/she has his/her residence, at sufficiently close intervals;**
- **Having regard to the fact that the places in such countries, where this person resides and works, have to be reasonably close to each other, even if the countries do not necessarily have a common border, but are close enough so as to allow for such returns at sufficiently close intervals.**

Nevertheless, the de jure definition is a far more complex problem. There is no single definition of frontier work at present that is unanimously accepted in legislative texts that govern particularly sensitive matters for this type of employment.

Obstacles to free movement of frontier workers

Frontier workers are faced with the same obstacles to movement that concern other mobile workers, such as, for instance, knowledge of the language in the country of employment or the difficulty of getting degrees and occupational qualifications obtained in another country recognised in the country of employment. Nevertheless, compared to the other mobile workers, known as 'transnational' workers, who have moved their place of residence or domicile in the same country as their place of employment, frontier workers face other obstacles due to their specific conditions, namely that such places of residence and employment have divided them between two different countries between which they may move each day. Frontier workers are in fact the ones most exposed to forms of indirect discrimination, based on the place of residence, i.e. those which most often go unnoticed and are the most difficult to eradicate.

Four specific areas are likely to constitute obstacles to free movement of frontier workers, to wit:

- a) Social security and social advantages;
- b) Direct taxation and tax advantages;
- c) Labour legislation;
- d) Regulations concerning entry and stay of third country nationals.

a. Social security and social advantages

As regards social security benefits, frontier workers who are nationals of an EU or EEA country or Switzerland, who reside in an EU or EEA country or Switzerland, and who are employed in another bordering or neighbouring EU or EEA country or Switzerland, are

subject to the provisions of Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of the social security system. This Regulation contains a definition of frontier worker: “any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week”.

The Regulation moreover stipulates that frontier workers have to be covered by the social security system of the country in which they work and not of the country in which they reside. There are exceptions to this principle, however, to wit:

- Unemployment benefits, which the frontier worker has to receive in the country of residence;
- Sickness benefits in kind, which the frontier worker may choose (except in certain countries) to receive in the country of residence instead of in the country of employment;
- Benefits in respect of accidents at work and occupational diseases, which the frontier worker may choose to receive in the country of residence instead of the country of employment.

There are however very many cases of discrimination against frontier workers practiced by the competent authorities in several European countries where frontier workers do not receive the social security benefits to which they are entitled because the national competent bodies refuse to pay them on the grounds that these workers do not reside in the country where they work. This happens in spite of a well established jurisprudence of the Court of Justice of the European Union, which has systematically ruled that the criterion of residence used to grant social security benefits to frontier workers is illegal and has ordered EU countries to pay the benefits due.

The situation is even more critical in the case of social security benefits that are put in place by the regional, provincial or local authorities of the countries subject to Regulation (EC) 883/2004, which are handled by the regional, provincial or local administrations or organisations of those countries. There are countless cases left virtually uncontrolled, where said administrations or organisations refuse frontier workers the social security benefits that fall under their purview on the grounds that they do not meet the residence criterion.

These remarks apply also to the social benefits and advantages referred to by Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement of workers within the Union. This regulation actually provides that by virtue of the principle of equal treatment, workers who are nationals of an EU or EEA country, present on the territory of another EU or EEA country, are entitled to the same social benefits and advantages as residents. Here once again, there are many cases where the administrations and organisations at the national, regional, provincial and local level refuse to grant certain workers, including frontier workers, and their families these benefits and advantages, on the grounds that they do not reside in the country of employment.

Frontier workers who are nationals and reside in third countries can receive social security benefits and other social benefits and advantages only if so provided by the regulation of reference of the bordering or neighbouring country where these workers are employed. Nevertheless, the national reference regulations of the country of employment often make the granting of social security and other social benefits and advantages subject to the residence (or domicile) criterion. In such a case, the frontier worker runs a high risk of not receiving those benefits.

b. Direct taxation and tax advantages

Direct taxation is a matter that has traditionally been in the hands of the national governments. Nevertheless, pursuant to Article 45 of the Treaty on the Functioning of

the European Union (TFEU), EU countries are requested to abolish any discrimination between persons (and therefore workers) interested in exercising the right of free movement in various fields, including that of direct taxation.

Consequently, to preclude the risk of a conflict of competence between governments for the taxation of the same yielder, the authorities concerned may be required to provide and regulate that eventuality through an international agreement. Conventions to prevent double taxation on income and capital, based on the model developed by the OECD, are an example of a widespread international instrument used to regulate such potential conflicts.

The general principle adopted in the OECD model convention on the taxation of employment income is that the competence for taxation lies with the country where the work is performed, irrespective of the signatory country in which the worker's residence is located. Nevertheless, in view of the "worldwide taxation" principle, which is applied in most countries in the world, the aforementioned models nearly always provide the authorities of the country where the worker has his/her residence with the faculty to ask him/her to declare, in that country, income earned in the country where he/she works. The taxpayer is thus granted the possibility of benefiting from different methods of taxation, in order to avoid a double taxation on the same income.

This regulation, which nonetheless entails certain constraints for the taxpayer, is suited more particularly to workers residing part of the year in their country of residence and the other part in their country of employment. It is certainly not suited for frontier workers, who are present daily, or nearly so, in both countries, and whose income would be taxed according to criteria suited for other types of mobility.

In line with the foregoing, Commentaries on the articles of the model convention to avoid double taxation on income and capital drawn up by the OECD suggest that problems arising from local situations and contexts must be solved and dealt with directly by the States concerned. Similarly, the Commission, in its Communication to the Council, the European Parliament and the European Economic and Social Committee (COM (2010) entitled "Removing cross-border tax obstacles for EU citizens,") encouraged the countries of the EU to adopt special rules for frontier workers and mobile workers, taking into account the interaction of the taxation and social security systems of the different EU Member States.

Many bordering countries concerned by frontier work have recognised in the texts of bilateral agreements they concluded the specific nature of the status of frontier workers and agreed specific rules to regulate the taxation of income of frontier workers generated from employment, and to provide a definition of the latter. Nevertheless, the definitions of frontier worker that can be derived from these texts differ not only from one convention to the other, but also from the definition contained in Regulation (EC) 883/2004, which is unique and binding for 32 European countries.

In certain cases, in spite of the explicit recognition of the phenomenon of frontier work in a bilateral agreement, the border region between the two countries where the frontier worker is supposed to work and reside seems to be ill defined compared to the empirical reality and does not represent the real territory within which the frontier work is performed, which is more extensive. As a consequence, workers who exercise cross-border mobility but reside outside the predefined frontier area, are considered as transnational workers, and cannot enjoy the same fiscal treatment of frontier workers residing a few kilometres closer to the same border.

Unfortunately, a sizeable number of conventions intended to avoid double taxation on income and capital that are concluded by and between the countries where frontier work is a historical phenomenon or at least present, do not recognise the specific nature of frontier workers. In all these cases, frontier workers are consequently forced to:

- Submit their employment income to a tax system provided for other categories of workers;
- Deal with two different tax administrations which frequently do not communicate and which often do not take due consideration of the relevant conventions, and thus expose the frontier worker to the risk of double taxation;
- Juggle with different methods of filing income tax returns and different filing deadlines which often do not coincide in the two countries, and consequently complicate the task of obtaining a deduction or tax credit of sums already paid in the country of employment;
- Deal with red tape and a near total absence of information on the subject.

c. Labour legislation

EU legislation, and Regulation (EU) 492/2011 in particular, provides for equal treatment for workers in the same EU and EEA country with regards to – inter alia – conditions of employment, work and salary, in accordance with the principle of *lex laboris loci*. Not everything is perfect on the labour law front, however.

Since 1 May 2010, wholly unemployed frontier workers may also avail themselves of the employment services of the State of their last employment, in addition to those of their country of residence. Nevertheless, in most States bound by Regulation (EC) 883/2004, this possibility is denied to nearly all wholly unemployed frontier workers on the grounds that they are not domiciled in the country of their last employment.

The situation of frontier workers employed in certain countries who have concluded other types of agreements for the free movement of persons with bordering or neighbouring countries of the EU is not more enviable. This is particularly the case of the Republic of San Marino, the internal legislation of which does not provide for the full and complete application of the principle of equal treatment for all workers. In fact, workers employed in this country, without residing there, can have an open-ended contract only after they have worked for the same company for 4 years. It is only at the end of that period that the employer can confirm that the worker has been hired permanently. Nevertheless, if the latter was to change jobs before having worked 4 years for the same company, a new period of the same duration under fixed-term contracts would start for him/her before he/she could get an open-ended contract.

d. Regulations concerning entry and stay of the third country nationals

Since EU and EEA country nationals and Swiss nationals are entitled to free movement, while third country nationals are not, the latter are consequently subject to regulations that govern the entry and stay of third country nationals on the territory of every EU Member State, EEA States and Switzerland. This situation also applies to third country nationals who wish to engage in mobility employment in an EU or EEA country, particularly as frontier workers.

In order to legally work in their country of employment, frontier workers from third countries must comply with regulations governing the entry and stay of third country nationals on the territory of those countries. In addition to a work visa which is usually required beforehand, these regulations nearly always require the third country worker to reside in the country where he intends to work and to report at least a domicile to the police in that country. The immediate consequence of this situation is that the large majority of frontier workers who are nationals of third countries resort systematically to illicit, undeclared or illegal work, in as much as they cannot obtain a work permit in due form.

In many areas of Europe, therefore, appropriate regulations governing frontier work seem necessary, also for workers from third countries who are keen to find a job in EU Member States, while continuing to reside in the third country.

ETUC's position and demands

The ETUC recognises the right of everyone to develop through work, even if to reach that objective a person has to rely on the employment market of another bordering or neighbouring country, without moving his domicile or residence. Frontier work, as a lever that helps achieve this right, must be performed legally and may not be impeded or obstructed by the shortcomings of national legal frameworks, discriminatory measures or unequal treatment to the detriment of those who do not reside in their country of employment.

Convinced of the need to guarantee full equality for all workers on the different employment markets, irrespective of their nationality and place of residence, the ETUC moreover considers that frontier work must be performed without unreasonable or unjustified restrictions.

The ETUC is also convinced that the systematic collection and analysis of data on this phenomenon, based on a standardised system at European level, could help remove the obstacles that stand in the way of frontier work.

For all the above mentioned reasons, the ETUC has made the following recommendations to the EU institutions and, through its affiliated trade union confederations, to the national governments when they are concerned

To the European Union:

- a) Monitor the attitude of the Member States regarding the movement of frontier workers to ensure the application of EU law and compliance with equal treatment and non-discrimination;
- b) Encourage Member States to adopt special rules so as to remove all kinds of obstacles that hinder the movement of all workers, particularly frontier workers.
- c) Encourage and support Member States in setting up specialist institutions to inform and support frontier workers (as well as mobile workers) to protect and enforce their rights.

To national governments, on social security and social advantages:

- d) Apply fully, as provided by European Union law, the principle according to which frontier workers are covered by the social security system of the country in which they work and not of the country in which they reside. This includes existing social security and other social benefits and advantages at national level, which are not explicitly cited in Regulation no. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, but which are nonetheless recognised and protected by Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement of workers within the Union;
- e) Ensure that the elements set out in the above letter are complied with not only by the national authorities and organisations, but also by all intermediate level territorial authorities and organisations (regional, municipal, etc.) empowered to provide social security and other social advantages;
- f) Conclude, at least with the governments of bordering or neighbouring third countries that are likely to be concerned by frontier work, agreements on social security that define and regulate appropriately the status of frontier worker and provide that social security and other social advantages be paid also to frontier workers who are nationals of third countries¹;

¹ Nationals of third countries' here refers only to frontier workers that reside in a third country and work in an EU country.

- g) If the agreements referred to in recommendation 'f' above cannot be concluded, provide at least that the governments concerned by frontier work adopt a national regulation on social security specifically for frontier workers, which provides a legal definition and recognises the specific nature of those workers for the payment of social security and other social advantages;

To the national governments, on direct taxation and tax advantages:

- h) Conclude, at least with the governments of bordering or neighbouring countries that are likely to be concerned by frontier work, international treaties that lay down in particular common rules so as to avoid double taxation on income and capital (drawing inspiration from model conventions on double taxation drawn up by the OECD and the UN);
- i) In the articles of the treaties referred to in recommendation 'h' above, which govern the taxation of employment income, insert a subsection to regulate the specific case of frontier work, providing a legal definition and political recognition of frontier workers;
- j) With reference to recommendation 'i' above, seek a realistic and up-to-date criterion in the international treaties with a view to delimit the phenomenon of frontier work: for instance, if based on the identification of a part of the territory of the country or countries concerned, this criterion will have to provide a faithful reflection of the area from which and to which frontier workers move;
- k) Provide that the tax revenues generated from frontier workers income are allocated in part to the country of residence of the latter;
- l) Irrespective of the choice made under recommendation 'k' above, provide that frontier workers can deal with only one tax administration – that of their country of employment or of residence – for all matters concerning income they earn from their employment and promote administrative collaboration between the concerned tax authorities, in order to prevent and avoid double taxation
- m) If the international treaties referred to under recommendation 'h' above cannot be concluded, provide at least that governments of the countries concerned by frontier work adopt an internal tax regulation specifically for frontier workers, that provides a legal definition and recognises the specific nature of frontier workers with respect to the taxation of employment income;
- n) For countries bound thereby, guarantee the full application of the principle of non-discrimination provided by Regulation (EU) no. 492/2011 as regards tax advantages;

To the national governments, on labour legislation and working conditions:

- o) Guarantee that the fact of not residing in their country of employment does not constitute a reason for not applying fully the principles of equal treatment (with particular reference to wages and working conditions) and the *lex laboris loci* to frontier workers. Guarantee the application of the principle "equal pay for equal work in the same workplace".

To national governments, on regulations concerning entry and stay of third country nationals:

- p) Having regard to the fact that third country nationals need a work permit in order to work legally in the EU Member States, guarantee that the fact of not having a residence on the territory of the employment country cannot impede third country nationals from engaging in frontier work, and cannot introduce obstacles and unfair treatment affecting them².

² Third country nationals' here refers only to frontier workers that reside in a third country and work in a EU country.