

## EU – CH relations with respect to cross-border workers

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## Introduction CH -EU relations

- I. Methodology
- II. Swiss domestic legislation
  - A. Unlimited tax liability
  - B. Limited tax liability
  - C. International assignment – Migrant workers – Short term workers
  - D. International assignment – Detached workers
  - E. Frontier workers – Weekly commuters
- III. Double tax treaties
  - A. Double residency
  - B. Allocation of taxing rights on income from employment
  - C. International assignment – migrant workers – short term workers - detached workers





D. Weekly commuters

E. Frontier workers

F. Home office

#### IV. Agreement on the Free Movement of Persons Switzerland – EU

A. General

B. Non discrimination according to CJUE

C. Prohibition of discrimination and tax at source on income from employment





# Introduction

## CH – EU relations





## WIN-WIN SITUATION

### CHF 1 BILLION

per day is the total amount of trade between Switzerland and the EU.

### TOP 3

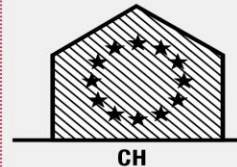
Switzerland is one of the EU's three biggest trading partners, alongside the US and China.



Switzerland earns one in every three francs through trade with the EU.



430,000 Swiss nationals live in the EU and about 1.4 million EU citizens live in Switzerland.



### COOPERATION

Since 2017, Switzerland has been fully associated with the EU research framework programme Horizon 2020.

Every day over 315,000 EU cross-border commuters come to work in Switzerland.



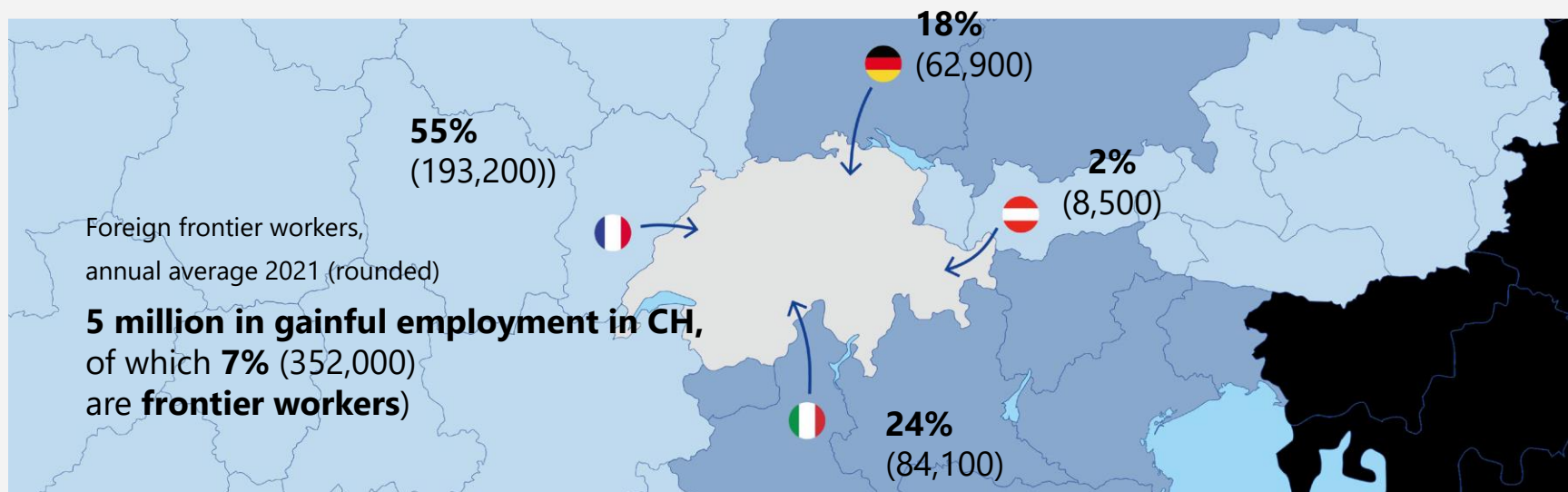
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• Source: Federal Department of Foreign Affairs FDFA Official Website:  
<https://www.fdfa.admin.ch/missions/mission-eu-brussels/en/home/switzerlands-policy/in-figures.html>





## Frontier workers



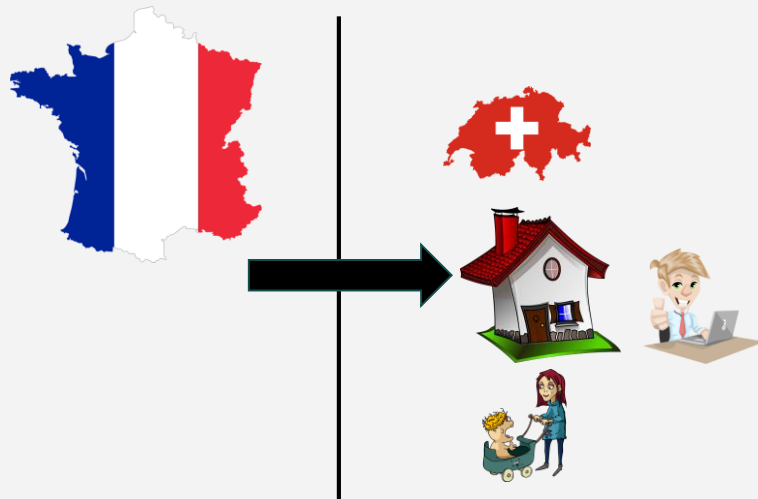
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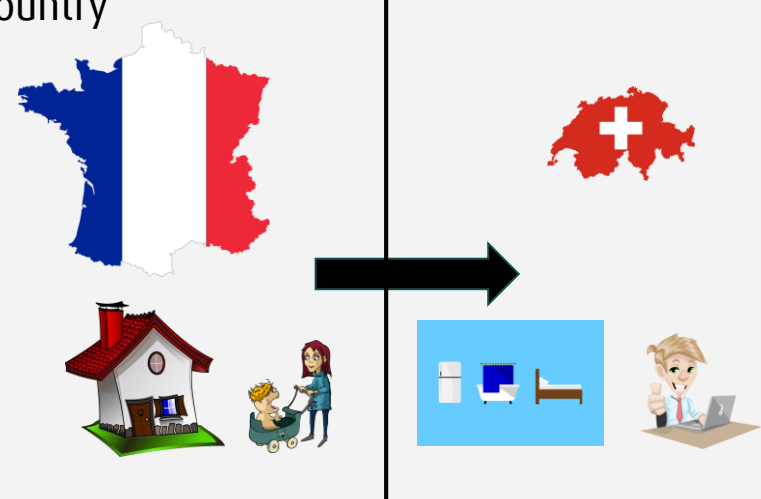


## Swiss inbound cases

International assignment -  
Migrant workers (tax residents):  
new permanent home in country of work

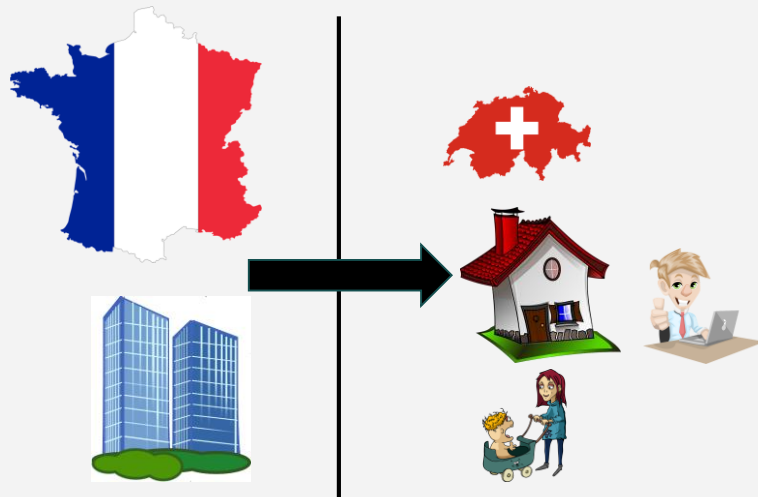


International assignment -  
Migrant workers / short term workers  
(non-tax residents):  
Keep centre of vital interests in home  
country

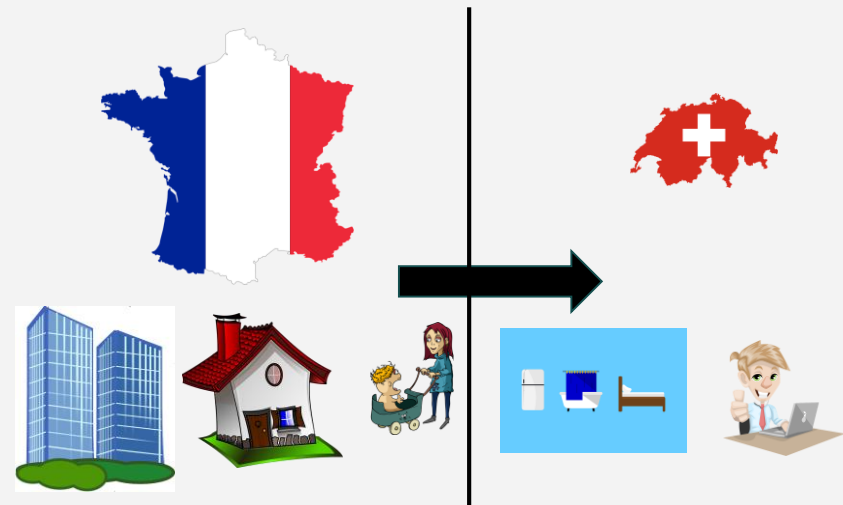




International assignment -  
Detached workers (tax residents):  
New permanent home in country of work  
employer in country of origin



International assignment -  
Detached workers (non-tax residents):  
Keep centre of vital interests in home  
country  
employer in home country



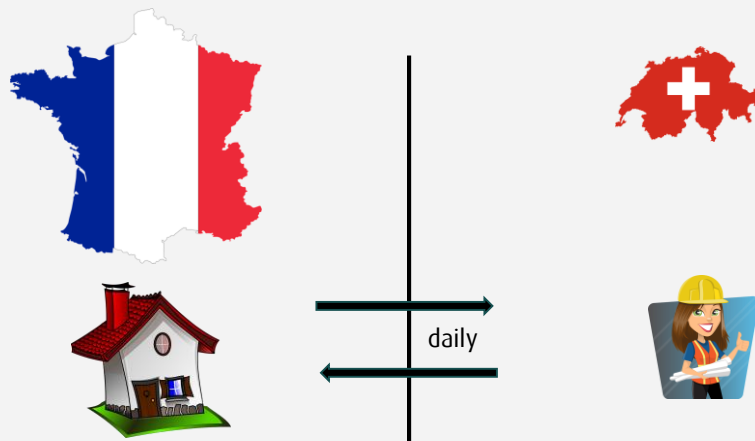




## Frontier workers

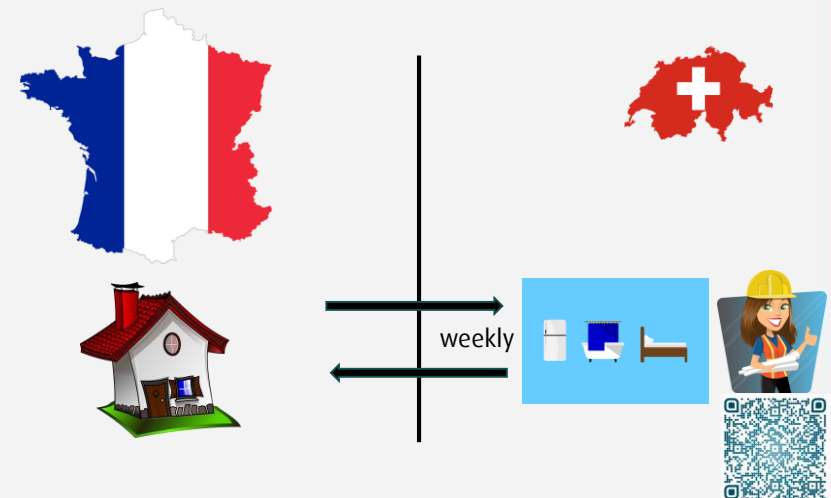
- remain resident in home country;
- work in a different country;
- usually go back to their place of residence every day

Lack of uniform definition for immigration  
(work permit), tax and social security purposes



## Weekly commuters

- remain resident in home country
- stay in country of work during week;
- usually go back to place of residence every weekend





# I. Methodology



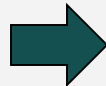


## General principle: negative effect of double tax treaties



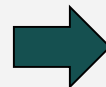
I. CH domestic law: unlimited or limited tax liability?

II. Unlimited tax liability



taxation of worldwide income

Limited tax liability

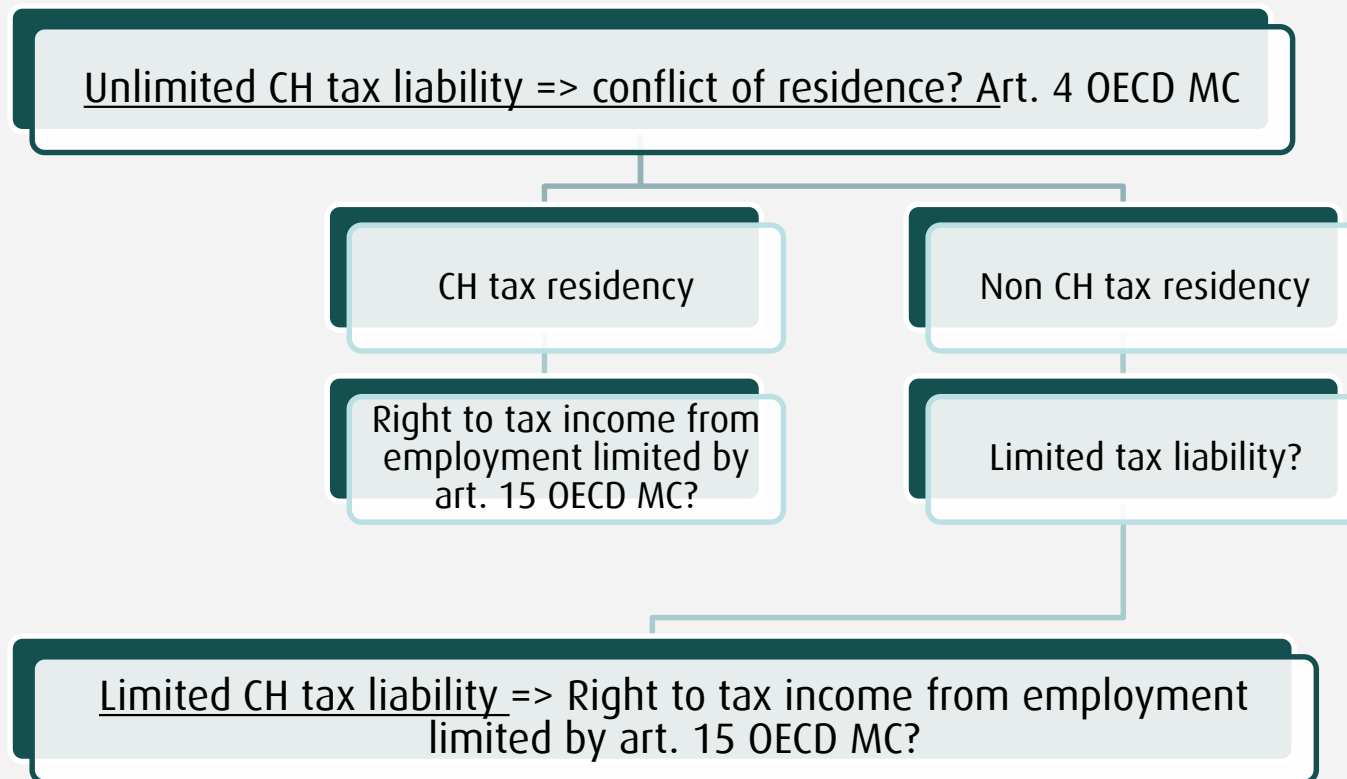


taxation of CH sourced  
(employment) income only



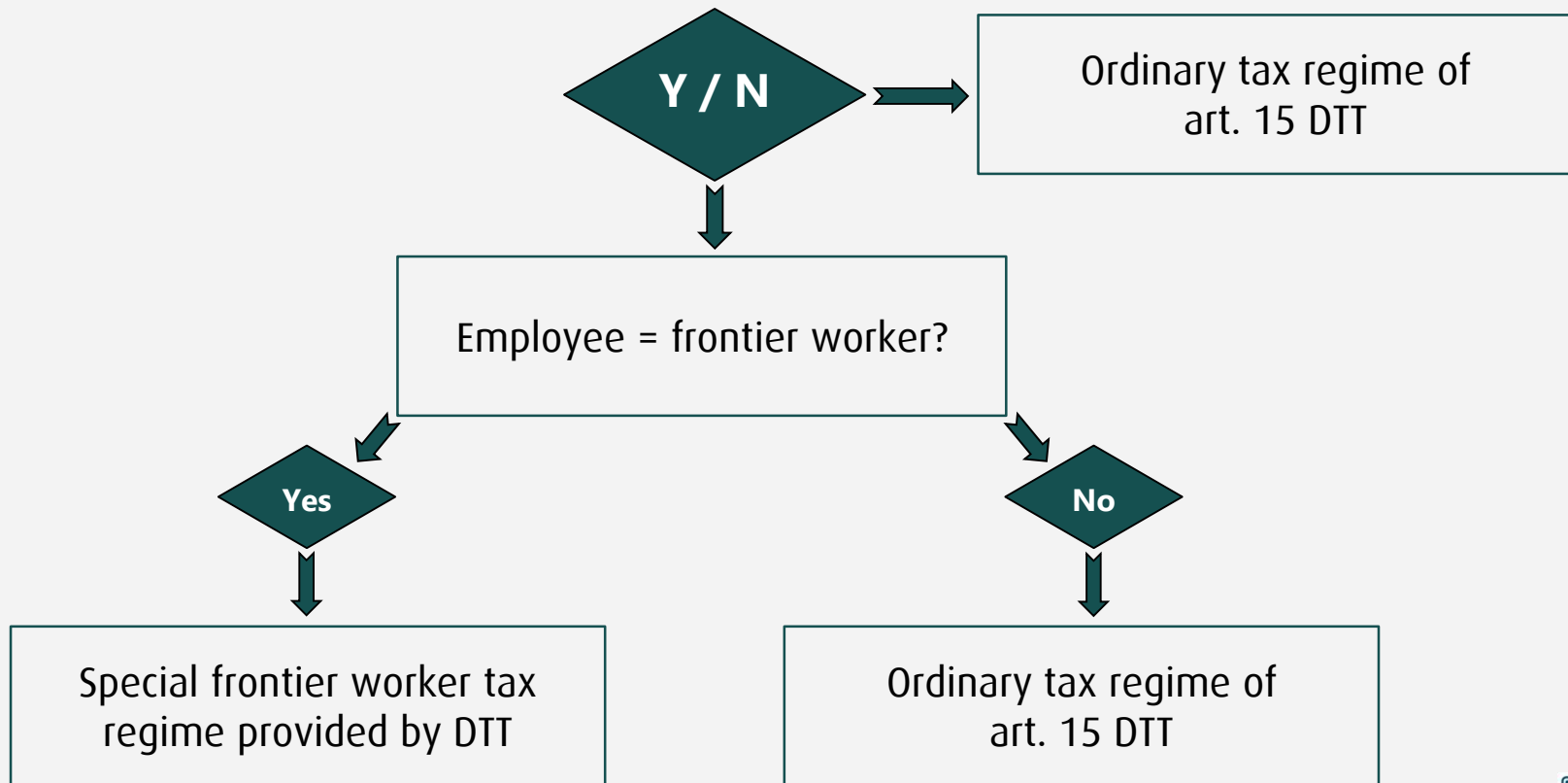


### III. Right to tax based on domestic law limited by double tax treaty?





#### IV. Lex specialis: special frontier worker tax regime in double tax treaty?





## II. Swiss domestic legislation





## A. Unlimited tax liability

### Art. 3 Federal Direct Tax Law (FDTL)

- Individuals are unlimited liable to tax because of their personal affiliation if they have a Swiss tax domicile or tax residence
  - As of day of immigration (art. 8 par. 1 FDTL)





- Domicile = place where a person lives with the intent to stay permanently.
- Presence test =
  - stay of a minimum of 30 days with a gainful activity, or
  - stay of minimum of 90 days without gainful activity

Without significant interruptions:

=> Frontier workers and weekly commuters are not unlimited liable to tax

=> Taxation on worldwide income (art. 6 par. 1 FDTL)







## B. Limited tax liability

Art. 5 par. 1 a Federal Direct Tax Law (FDTL)

- Individuals without a tax domicile or tax residence in Switzerland are limited liable to tax by reason of an economic attachment if e.g.:
  - they exercise a gainful activity in Switzerland  
Federal Tribunal has stated that limited tax liability is based on days of physical presence (2C\_662/2010)  
(cfr OECD MC Comm. ad art. 15)
- ⇒ Taxation of Swiss source employment income (art. 6 par. 2 FDTL)
- Question: physical presence while home office in Covid situation?





## C. International assignment – Migrant workers – Short term workers

1. Unlimited liability
2. Taxation on worldwide income and net wealth
3. Ordinary or source taxation (nationality; type of work permit; level of salary...) (art. 83 ff FDTL)
4. Subsequent ordinary tax procedure?





## D. International assignment – Detached workers

1. Unlimited liability
2. Taxation on worldwide income and net wealth
3. Ordinary taxation
4. No source taxation





## E. Frontier workers – Weekly commuters

1. Limited liability
2. Taxation of work days with physical presence in CH
3. Source taxation of CH salary if employer in CH (art. 91 ff FDTL)
4. Subsequent ordinary tax procedure?





### III. Double tax treaties





## A. Double residency

- Art. 4 OECD MC: «resident» = liable to tax in a Contracting State by reason of domicile, residence or any other criterion of similar nature
  
- Tie breaker rule
  - Permanent home
  - Centre of vital interests
  - Habitual abode
  - Nationality
  - Mutual agreement





## B. Allocation of taxing rights on income from employment

### ➤ Art. 15 OECD MC

1. Residence State = Work State  
=> Taxation in Residence State

2. Residence State  $\neq$  Work State  
=> Taxation in Work State

3. Except if:

a) Days of physical presence in Work State  $\leq$  183 days; AND

b) Employer is not resident in Work State; AND

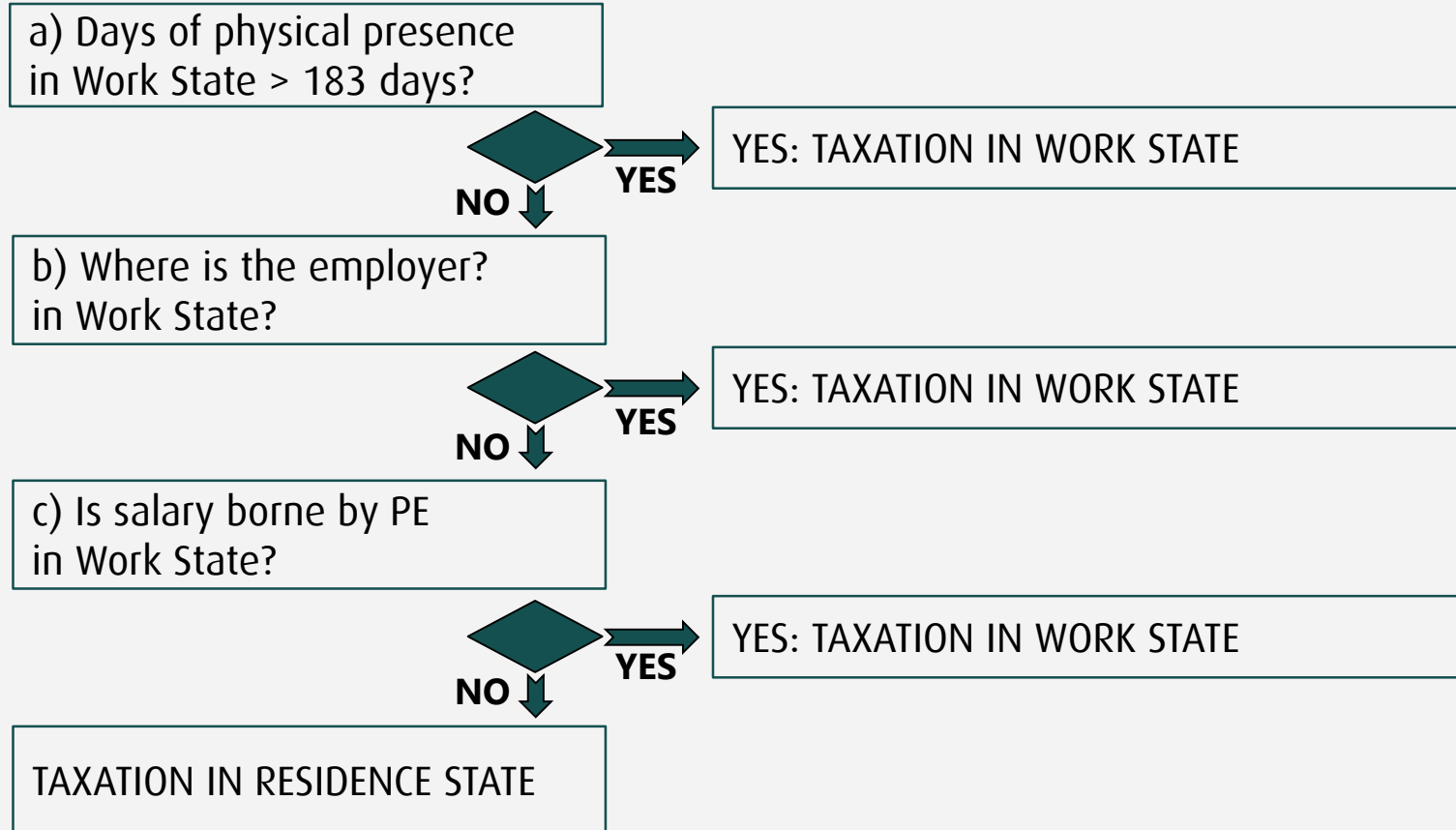
c) Salary is not borne by PE in Work State

=> Taxation in Residence State





## 2. Application of art. 15 OECD MC Residence State $\neq$ Work State







## C. International assignment – migrant workers – short term workers – detached workers

### 1. Application of art. 4 OECD MC

- Conflict of residence solved in favour of CH  
(= unlimited tax liability in CH)
- Conflict of residence solved in favour of EU country  
(= limited tax liability in CH)

### 2. Application of art. 15 OECD MC



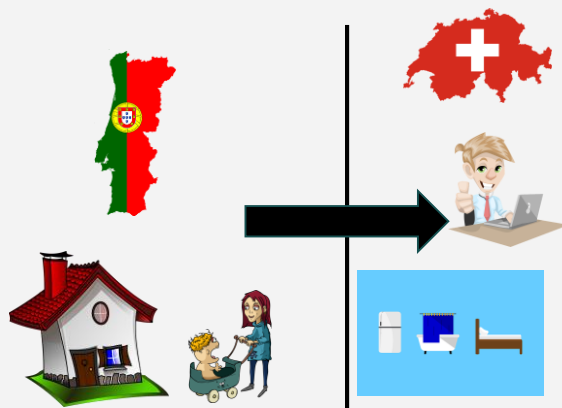


Tiago, a Portuguese national, lives with his family in a family owned property in Porto. He is hired by a Swiss company to work in Lausanne for 6 months in 2021. He is granted a L permit for this purpose.

Tiago rents a flat in Lausanne for this period; his family comes to visit him during school holidays.

Allocation of taxing rights from CH domestic and DTT perspective?

Procedure?



- Unlimited tax liability in CH (art. 3 par. 1 a FDTL)
- Limited by DTT?  
Art. 4 par. 2 PO – CH DTT
- Limited tax liability in CH (art. 5 par. 1 a FDTL)
- Limited by DTT?  
Art. 15 par. 1 PO – CH DTT  
Exception of art. 15 par. 2 PO –CH DTT does not apply
- Source tax withholding by CH employer





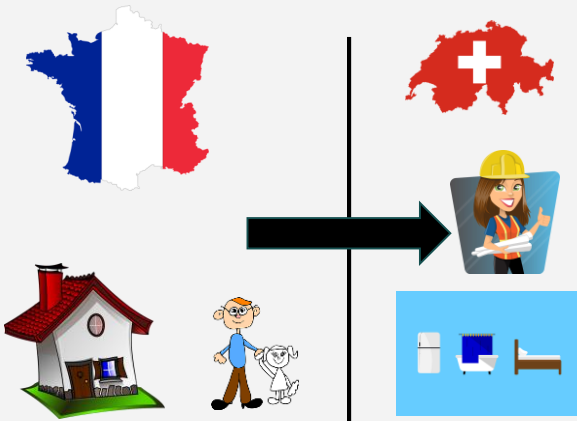
## D. Weekly commuters

Anna lives with her family in a family owned property in Lyon (F). She is hired by a Swiss company to work in Lausanne, and is granted a B permit for this purpose.

Anna rents a flat in Lausanne and goes back to her family every weekend.

Allocation of taxing rights from CH domestic and DTT perspective?

Procedure?



- Limited tax liability in CH (art. 5 par. 1 a FDTL)
- Limited by DTT?
  - Special frontier worker regime?
  - Art. 17 par. 1 F – CH DTT => taxing rights allocated to CH
  - Exception of art. 17 par. 2 F – CH DTT does not apply
- Source tax withholding by CH employer





## E. Frontier workers

- Frontier worker for tax purposes: see bilateral DTT's
- No uniform tax treatment of frontier workers with the different neighbouring countries of CH.
  - Taxation in State of Residence (F – CH for most cantons)
  - Taxation in State of Work (F – CH for GE)
  - Simultaneous taxation in State of Residence and Source (D – CH)
  - Cross-border tax equalization





a) France

- Art. 17 DTT globally comparable to art. 15 OECD MC
- Art. 17 par. 4: provisions of agreement of April 11, 1983, which are an integral part of the DTT, apply notwithstanding previous paragraphs

Only for cantons BE, SO, BS, BL, VD, VS, NE and JU

Exclusive taxation in State of Residence with compensation of 4.5% of global wages paid to State of Work  
=> No CH tax at source





- «Frontier worker» = person resident in one State exercising a salaried activity in the other State for an employer established in that other State and who returns, as a rule, every day to the State of which he / she is resident
  - Mutual agreement between Competent Authorities on definition of frontier worker and interpretation of «as a rule»
  - upper limit of 45 nights outside of country of residence
  - Nights outside of country of residence = nights in State of work + nights in third States for professional reasons (business trips)
  - If > 45 nights: worker loses qualification of frontier worker
    - ⇒ art. 17 par. 1 -3 DTT (ordinary regime) applicable
    - ⇒ CH tax at source



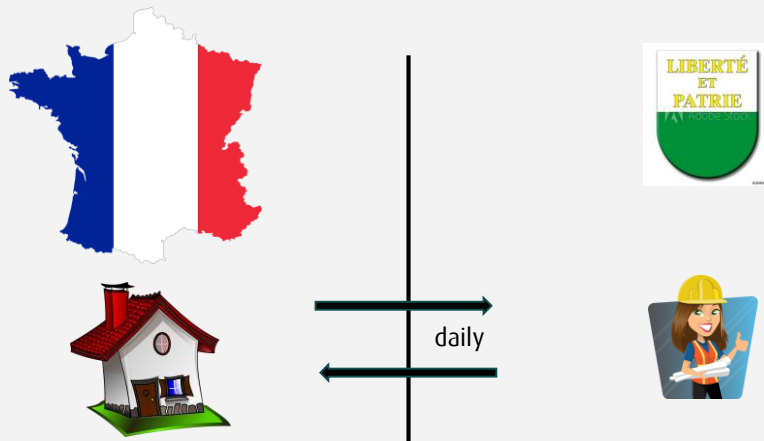


- Agreement of January 29, 1973, signed between France and Switzerland, on behalf of Canton of Geneva:  
financial compensation of 3.5% of global wages paid by Canton of GE to neighbouring French departments
- All other cantons: DTT CH - F (no special border-worker regulations)



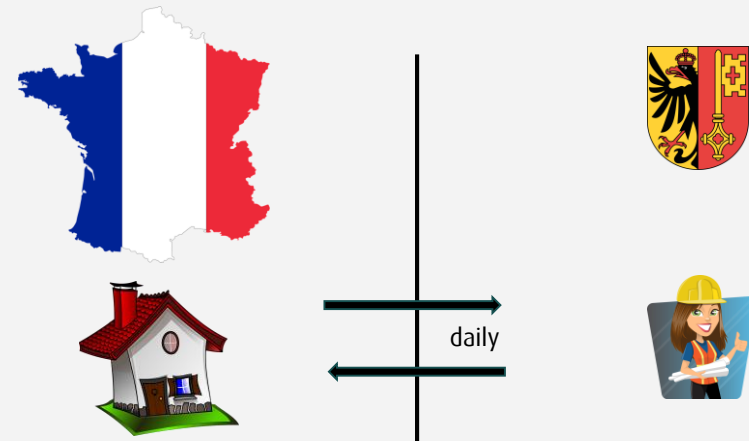


## Frontier workers Canton of Vaud



- Limited tax liability
- Corresponds to definition of frontier worker?
- Yes => no CH tax at source
- No => CH tax at source

## Frontier workers Canton of Geneva



- Limited tax liability
- Art. 17 par. 1-3 DTT
- CH tax at source







## b) Germany

- Art. 15a DTT + Protocol 1991 + Mutual Agreements
- Taxation in State of Residence («may») and source tax in State of Work («may») of 4.5% of gross compensation maximum
- «Frontier worker» = person resident in one State with place of work situated in the other State, from where they regularly return to their place of residence.
  - ≤ 60 business days per calendar year outside of domicile
- Applicable to all cantons





### c) Liechtenstein

- Art. 15 par. 4 DTT + Protocol + Mutual agreement
- Taxation in Residence State only
- Frontier worker = person domiciled in one Contracting State and having work place in other Contracting State, and, as a rule, every business day go from their domicile to their work place
- Loss of status if no return to domicile for > 45 work days for professional reasons
- Applicable to all cantons





## d) Austria

- Ordinary regime of art. 15 DTT
- Final Protocol to DTT: compensation of 12.5% of taxes collected with persons employed in Switzerland and residing in Austria





## e) Italy

- Art. 15 par. 4 DTT: application of Agreement of October 3, 1974,
- Cantons of GR, VS and TI
- Exclusive taxation in Work State
- Compensation to Italian neighbouring communes of 40% of withholding taxes levied in Switzerland
- No definition of frontier worker
- All other cantons: DTT CH-I (no special border-worker regulations)





- New Protocol signed on 23.12.20: future departure from place of work principle – not yet in force
- Definition of frontier worker: workers living within 20 km of border and as a rule returning daily to their domicile (definition already applied in practice in the past)  
  
=> Determining residence is crucial for qualification as frontier worker
- New vs existing frontier workers





- Shared taxing rights between State of Residence and State of Source for “new” frontier workers (= arriving on labour market after entry into force): 80% of regular source tax in favour of State of work; ordinary taxation in State of Residence; State of Residence gives credit
  - => No qualification as virtual resident!
- Reciprocity; exchange of information on “new” frontier workers
- Transitional regime for existing frontier workers: exclusive taxation rights for State of Source with compensation of 40% of taxes to neighbouring municipalities until 2033; after 2033: no compensation to be paid anymore.





## f) Swiss employer

- Important compliance obligations for employer! (computation of work days spent outside of State of Work; difficulties in case of change of employment during year or part time employment; home office...)
- Source tax withholding or not?

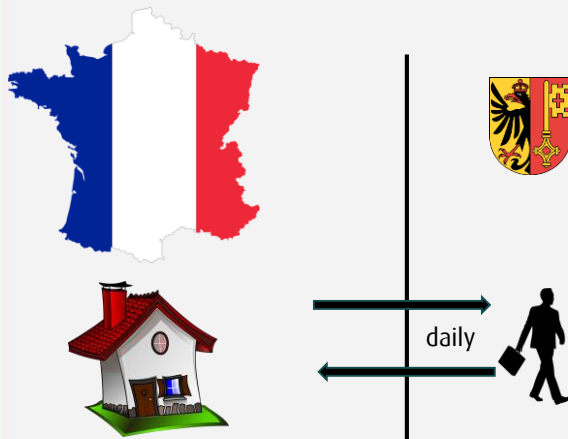




John lives with his family in Annemasse (F), and works in Geneva for a Swiss employer. He goes every day to his office.

Allocation of taxing rights from CH domestic and DTT perspective?  
Procedure?

- Limited tax liability in CH (art. 5 par. 1 a FDTL)
- Limited by DTT?
  - Art. 17 par. 1 F – CH DTT => taxing rights allocated to CH
  - Exception of art. 17 par. 2 DTT does not apply (employer in CH)
- Source tax withholding by CH employer

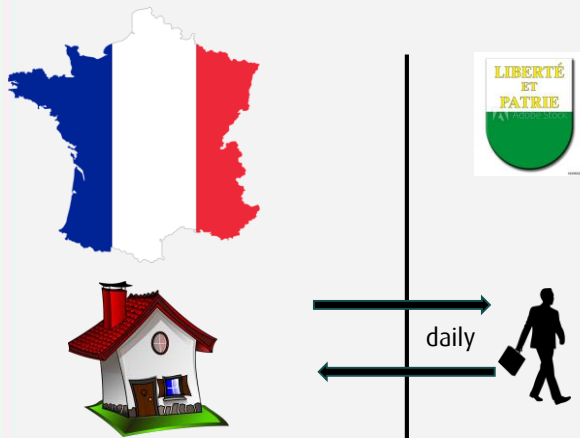






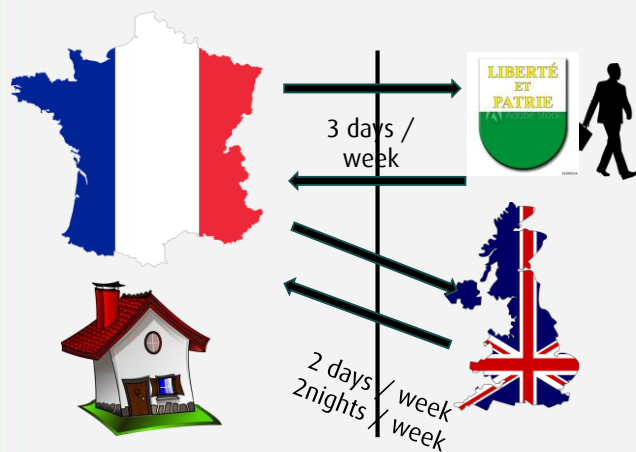
John lives with his family in Divonne (F), and works in Lausanne for a Swiss employer. He goes every day to his office.

Allocation of taxing rights from CH domestic and DTT perspective?  
Procedure?



- Limited tax liability in CH (art. 5 par. 1 a FDTL)
- Limited by DTT?
  - Art. 17 par. 4 F – CH DTT => agreement of April 11, 1983 applicable to VD
  - Exclusive taxation in France
  - CH restricted from taxing income from employment
- No CH tax at source





John lives with his family in Divonne (F), and works for a Swiss employer in Lausanne. He needs to travel for business to the UK approximately 2 days per week.

Allocation of taxing rights from CH domestic and DTT perspective?  
Procedure?





- Limited tax liability in CH based on days of physical presence (3 days / week) (art. 5 par. 1 a FDTL)
- Limited by DTT?  
Art. 17 par. 4 F – CH DTT => agreement of April 11, 1983 applicable to VD  
Definition of frontier worker on basis of mutual agreement: > 45 nights / year outside of State of residence => loss of status of frontier worker
- Art. 17 par. 1 F - CH DTT => taxing rights allocated to CH Exception of art. 17 par. 2 DTT does not apply (employer in CH)  
OECD Commentary par. 1 on art. 15: decisive criterion = days of physical presence when performing the work for which the income is paid  
= CH limited tax liability
- Source tax withholding by CH employer on salary corresponding to 3 days / week ( or ordinary subsequent tax procedure request)





## F. Home office

### a) Covid-19 pandemic

- Cross-border travel restrictions and home office => displacement of taxing rights?
- Questions:
  - ✓ Physical presence in State of work
  - ✓ Qualification as frontier worker: lack of daily crossing of the border
- OECD guidelines on tax treaties and the impact of the Covid- 19 pandemic  
03.04.2020 - 20.01.2021





- Temporary mutual agreements between CH and France, Italy, Germany and Liechtenstein: frontier workers and non frontier workers
  - Factual fiction => “as if ordinary circumstances”
    - ⇒ Continued source tax withholding by CH employers
- Prevention of double taxation and double non-taxation
- End on 30.06.2022
- Other States without mutual agreement? Strict application of DTT?





## b) Future?

- Growing awareness about issues in relation with “cross-border” work from home
- Protocol to new frontier worker agreement with Italy: regular consultations regarding development of teleworking
- Study VD, BE, JU and NE of 29.04.2022
- European level: French resolution dated March 2020 inviting EU bodies to revisit the social security and tax questions in relation with work from home performed by frontier workers
- Purpose: probably allow 2 days / week work from home for frontier workers without involving a modification of applicable tax and social security rules





➤ Canton of Geneva

Application of CH-F DTT => taxation in State of Work

If work from home in France: Residence State (F) = Work State (F)  
=> taxing rights allocated to France as of the first hour of work from home



➤ Consequences:

- ✓ GE: source tax withholding on part of salary compensating days worked in GE only (attestation of days worked in CH, F or 3<sup>rd</sup> States)
- ✓ F: salary compensating days worked in F and in 3<sup>rd</sup> States = taxable in F only  
French source tax withholding by CH employer ⇔ CH criminal code prohibiting to levy taxes on behalf of foreign State
- ✓ Loss of qualification as virtual resident (90% of income taxable in CH)
- ✓ Disconnection CH source tax and social security withholding





➤ Conclusions:

- ✓ Compliance obligations for employers (source tax withholding; calendar)!
- ✓ Different social security and tax rules for resident and frontier teleworkers might lead to discriminatory treatment by employer!
- ✓ Until political agreement: recommendation to GE employers NOT to admit work from home for frontier workers residing in France
- ✓ Contradictory political interests:

GE: minimum purpose to admit a 25% threshold of work from home (= threshold for social security purposes)

Consequences on financial compensation to be paid by GE to F

Social security threshold of 25%: increase of threshold not likely to be accepted







## IV. Agreement on the Free Movement of Persons Switzerland – EU





## A. General

- Agreement on the Free Movement of Persons (AFMP) between EU and CH: signature on 21 June 1999 and entry into force on 1 June 2002 for EU and CH citizens
- Applies to EU – CH nationals “moving” in CH and the EU
- Principle of free movement of persons between the territory of the European Union and that of the Swiss Confederation
- The host State must grant foreign nationals the same living, employment and working conditions as those granted to nationals. The Agreement provides protection against discrimination based on nationality to residents of a Member State (Art. 2 AFMP).





➤ Annex I AFMP: Free movement of persons  
Chapter II: Employed persons

✓ Art. 9 Annex I: Equal treatment

- Art. 9 para. 1 Annex I: non discrimination as regards conditions of employment
- Art. 9 para. 2 Annex I: non discrimination in tax matters. *An employed person and the members of his family (...) shall enjoy the same tax concessions and welfare benefits as national employed persons and members of their family.*

✓ Prohibits direct and indirect discrimination





## B. Non-discrimination according to CJUE

- Residents and non-residents are not, as a rule, comparable.  
=> Difference in taxation between residents and non-residents ≠ necessarily discrimination.
- However: direct and indirect discrimination are prohibited.
- Indirect discrimination: application of other criteria than nationality lead to same result of discrimination as if it were on the basis of nationality.  
  
E.g. non-residents are denied certain benefits which are granted to residents.  
Non-residents are usually foreigners => disadvantage will more likely affect nationals of other Member States than nationals





- Tax benefits only granted to residents may constitute indirect discrimination by reason of nationality: when residents and non-residents are factually in the same situation and comparable
- Discrimination justified?





## C. Prohibition of discrimination and tax at source on income from employment

Virtual resident – discrimination?  
2C\_319/2009 and 2C\_321/2009

26.01.2010

- Swiss national residing in France and employed in Switzerland (GE)
- Subject to source tax withholding on basis of limited tax liability in CH
- Taxpayer asks for rectification of source tax and requests the deduction of additional expenses not included in source tax lump-sum tariffs (e.g. family situation, professional expenses, insurance premiums)





- Deduction of most expenses refused (commuting expenses, insurance premiums,...) on grounds such deductions were considered in the source tax tariffs
  - ⇔ Ordinary tax assessment: all expenses deductible
- Taxpayer claims discrimination and violation of art. 2 and art. 9 para. 2 Annex I of AFMP





➤ Federal Tribunal:

- Application of CJUE case law (indirect discrimination; residents and non-residents not in a comparable situation; comparable situation if most of income earned in State of employment)
- Taxpayer realized more than 90% of family income in CH => to be considered in a comparable situation as resident taxpayer (virtual resident)
- If taxpayer can not claim same deductions as resident taxpayer: violation of art. 2 and 9 para. 2 Annex I AFMP
- non-discrimination principle of art. 2 and 9 para. 2 of Annex II of AFMP is directly applicable and supersedes derogating provisions of Swiss domestic tax law
- = application of Schumacker



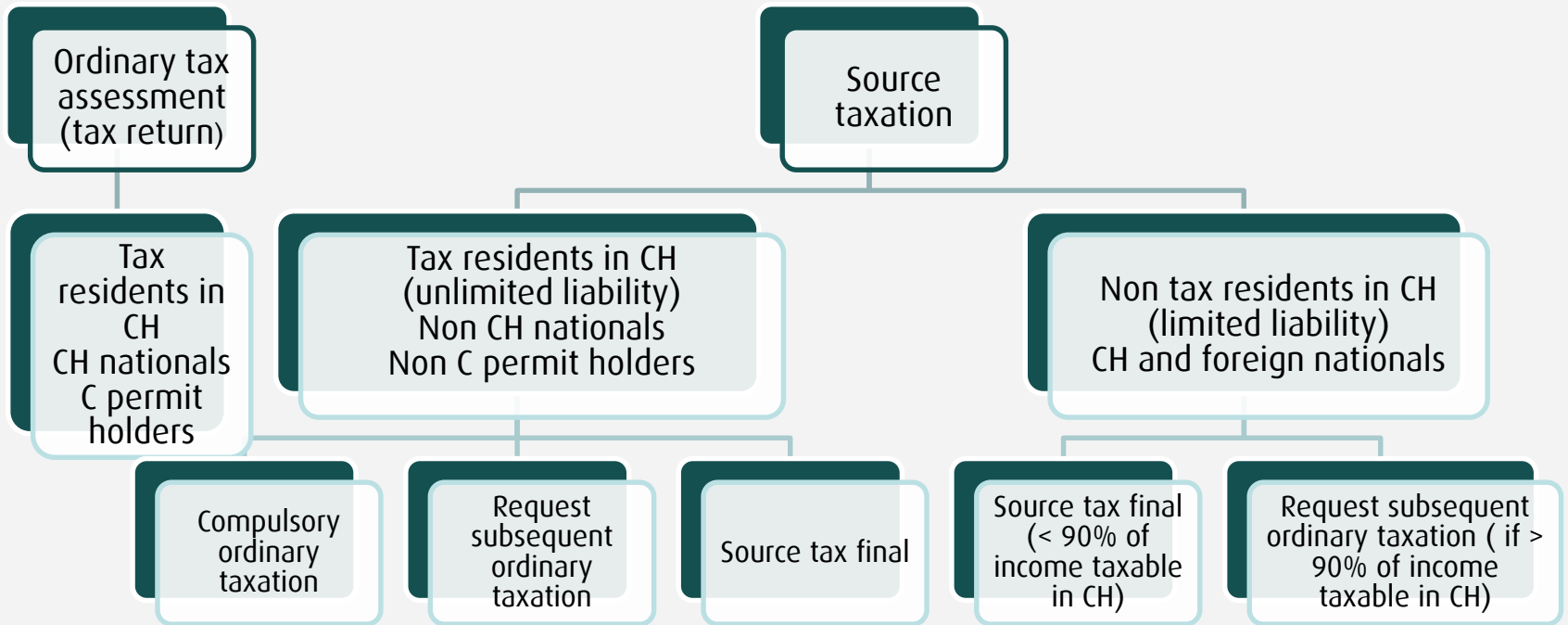




## Federal Law on revision of tax at source on income from employment

- Entry into force: 01.01.2021
- Domestic legislation also applicable to non-EU and non-EFTA citizens (<=> AFMP)
- Main features:
  - Source tax withholding is maintained
  - Reduction of unequal treatment between taxpayers subject to ordinary taxation and taxpayers subject to source taxatio







- Subsequent ordinary taxation for all resident taxpayers
    - upon request if salary < CHF 120'000  
and no other income subject to source tax nor taxable wealth  
before March 31 of year n+1  
  
=> tax return to be filed, also for all subsequent years until end of subjection  
to source tax  
  
If no request for subsequent ordinary taxation is filed: source tax becomes  
final (no other deduction)
    - Compulsory
      - ✓ if salary  $\geq$  CHF 120'000
      - ✓ if other income not subject to source tax withholding or if taxable wealth
- => tax return to be filed, also for all subsequent years until end of subjection  
to source tax





- Subsequent ordinary taxation for non resident taxpayers

- Upon request before March 31 of year n+1 of each year

- Virtual resident = 90% of worldwide gross income taxable in Switzerland, including spouse's income (Revised Ordinance)

80% of worldwide gross income realized in Switzerland ≠ virtual resident => no violation of non-discrimination principle based on AFMP (2C\_450/2017)

- Comparable situation with taxpayer domiciled in CH

Taxable basis in country of residence not sufficient for deductions (CJUE Commission vs Estonia 10.05.2012 C-39/10)

- Deduction on basis of DTT

e.g. deduction of contributions to foreign pension funds





- Still discrimination?
  - Frontier workers and work from home? Justified?
  - Source taxation for EU nationals resident in CH?





Thank you for your attention

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