Tax and social security consequences of working from home (France / Netherlands)

28 March 2023

mazars

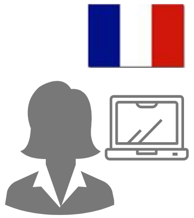
Agenda

1. Introduction
2. Impact on social security position
3. Impact on the employee’s personal income tax
4. Impact of the employer’s corporate income tax : potential risk of permanent establishment
5. Q&A

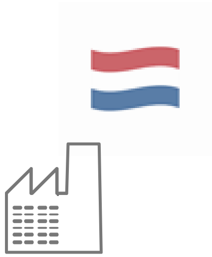
01

Introduction

1. Introduction

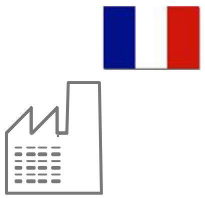


French tax resident
Working remotely from
home in France



Dutch employer

- Impact on social security position
- Impact on the employee's personal income tax
- Impact on the employer's corporate income tax : potential risk of permanent establishment
- Not discussed today: tax residency & labor law implications



French employer

Dutch tax resident
Working remotely from home in
the Netherlands

02

Impact on social security position

2.1. Social security consequences

Basic principle: within Europe, an employee can be affiliated to only one social security scheme and pays contributions in only one country, even if he/she works in several countries.

If the employee works in only one country, he/she will be socially insured in that country (even if it is not his/her country of residence).

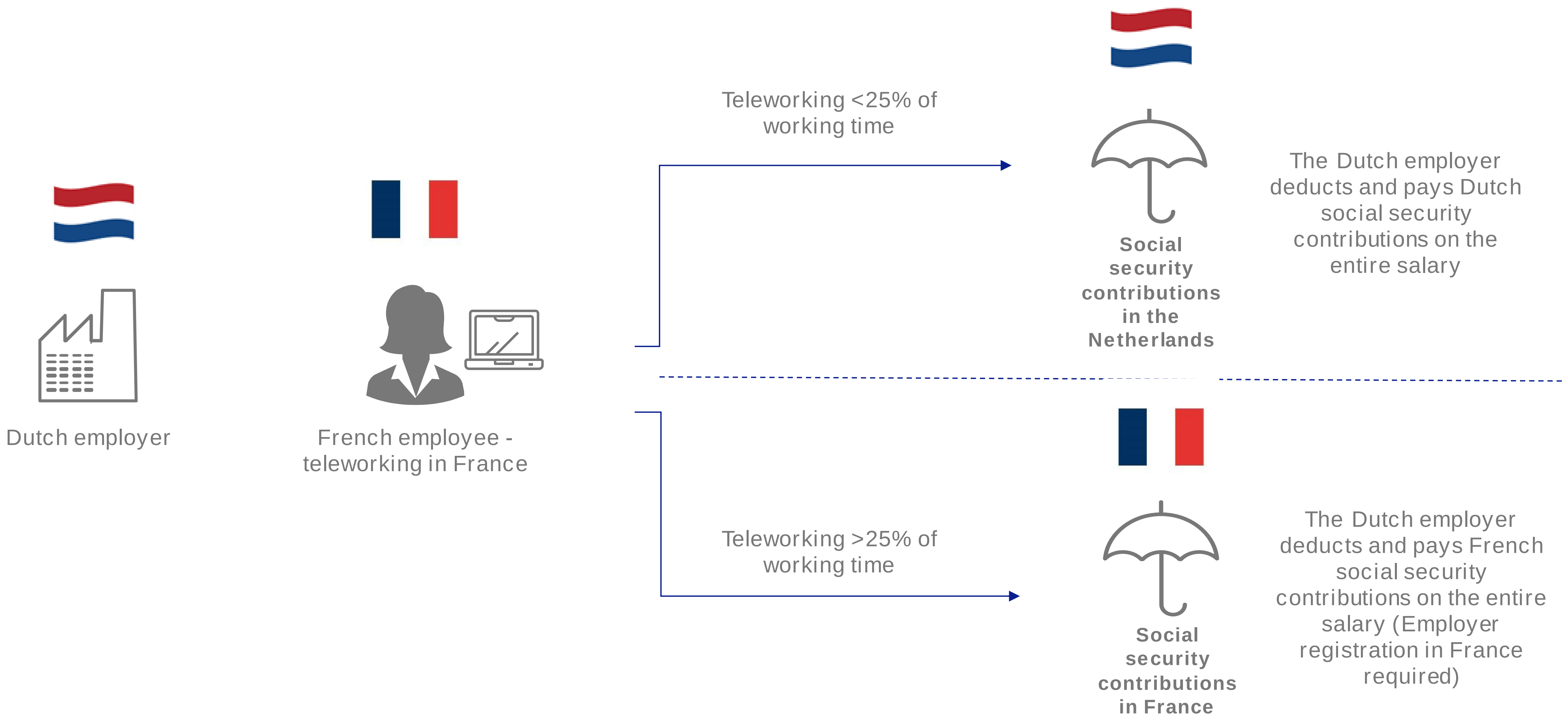
Exception 1: Working in two or more countries :

- If employee works at least 25% of his/her working time in the country where he/she resides, he/she will be subject to the social security scheme in his/her State of residence ;
- If employee works less than 25% of his/her working time in the country where he/she resides, he/she will be subject to social security scheme of the country where the employer is based.

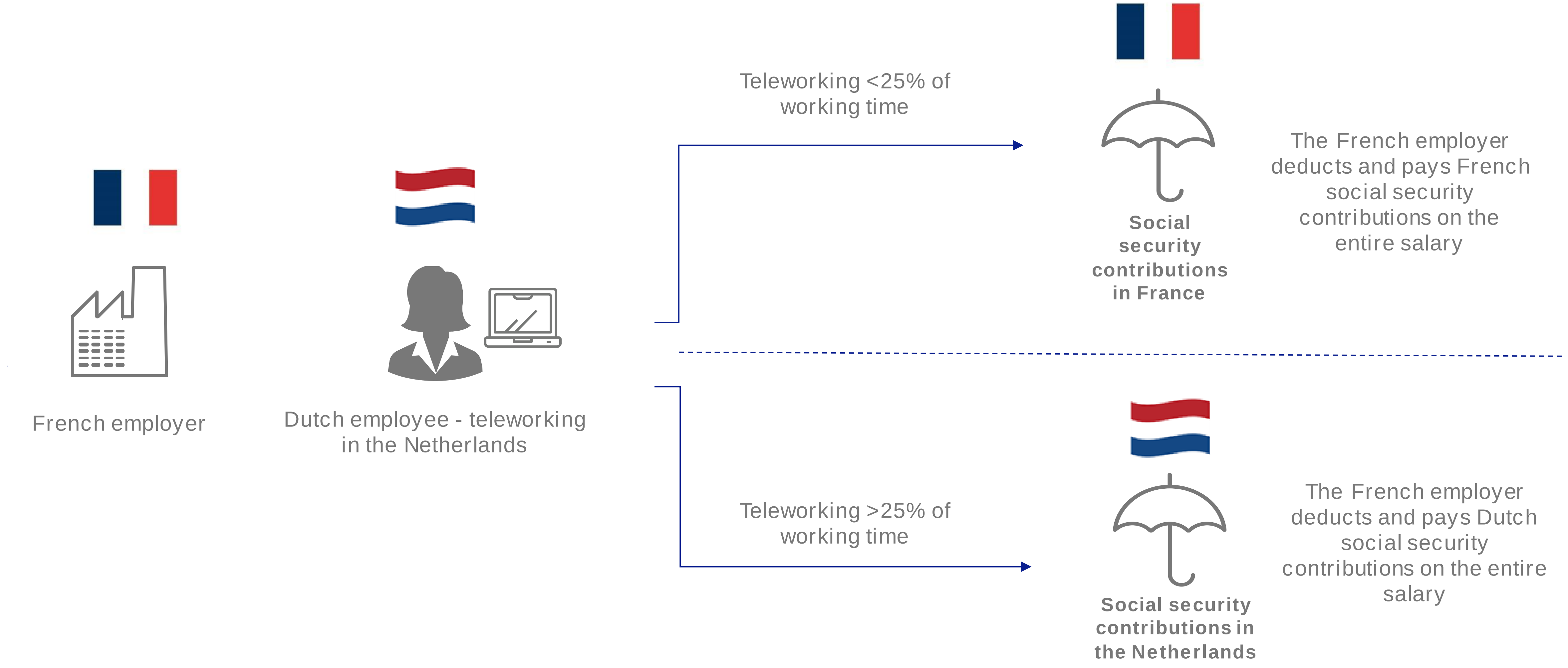
➢ Assessment work pattern over a 12-months period.

Exception 2: Temporary assignment abroad

2.2. Example 1 : French resident employee / Dutch employer



2.3. Example 2 : Dutch resident employee / French employer



2.4. Specific agreement due to COVID-19

In order to avoid an unwished change in the social security system applicable to an employee as a result of the increased use of teleworking due to COVID-19 measures, the EU countries have introduced a period of flexibility for cross-border workers who carry out a substantial part of their activity by teleworking in their State of residence.

- This means that a change in the employee's working pattern as of 12 March 2020 does not have any consequences for his/her **social security position** if the employee temporarily work in another country, for example as a result of teleworking from home in France / the Netherlands.

Exceptional and temporary measure: only applies to telework made compulsory to combat the spread of Covid-19 and until 1 January 2023.

There has recently been a commitment to extend these social security tolerance agreements until 30 June 2023. This has been confirmed by the social security authorities in both the Netherlands and France, although the publication of the legal documents is currently not yet available. During this six-month extension, the EU Commission will further analyze the challenges of cross-border remote working.

If the employer and the employee have agreed, independently of Covid-19, to introduce telework measures on a permanent basis, this special agreement will not be applicable (basic rules applies).

2.5. What’s next … ?

Disclaimer: this is not yet official and was obtained via confidential and off-the-record discussions. This cannot be considered as advice from Mazars.

Expected evolution of legislation

- Extension of the current social security position for 6 months
    - By the end of March 2023: EU-social security committee drafts new proposition of rules
    - By the end of June 2023: Implementation by the countries
    - 1 July 2023: new regulation effective
- Definition “remote working”
- Division of 3 categories
    - ‘Normal’ employees
    - Self-employed persons
    - ‘Special’ cases
- To be continued…

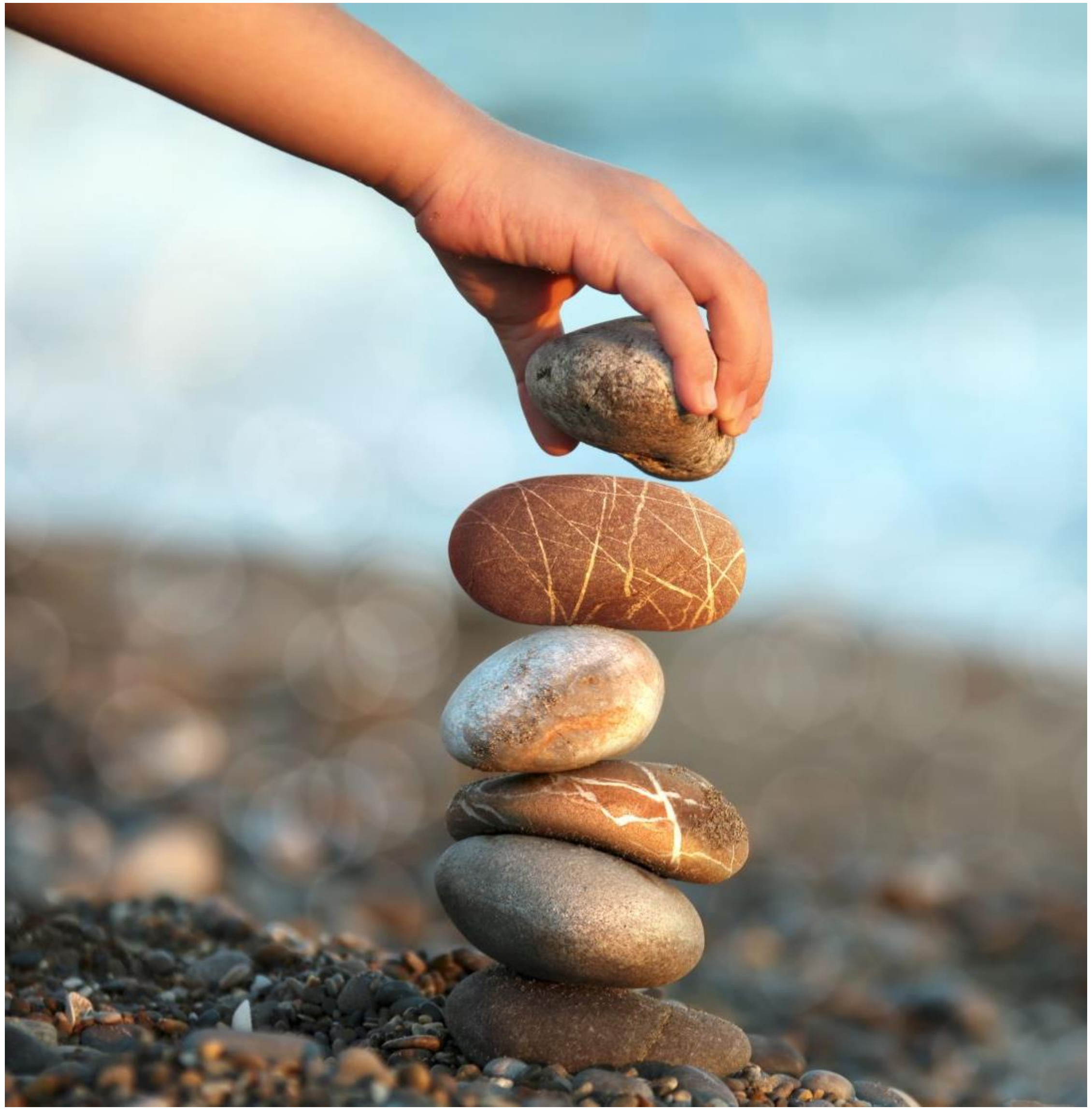
2.6. Social security formalities

Situation 1: Application of French social security system

- France: Provision of A1-certificate to work in the Netherlands by the French Social Security Agency (URSSAF) + Provision of S1-certificate by the French public health insurance body (CPAM)
- The Netherlands: (*optional*) Voluntary insurance for the national insurance schemes (AOW/ANW) and for unemployment and incapacity for work (WW/WIA/Ziektewet).

Situation 2: Application of Dutch social security system

- France: Transmission of S1-certificate delivered by Dutch authorities to the French public health insurance body (CPAM)
- The Netherlands: Provision of A1-certificate by the Dutch Social Security Office (SVB) to confirm the Dutch social security position + S1 certificate (health insurance)



03

Impact on the employee’s personal income tax

3.1. Principles of salary taxation under the NL-FR tax treaty

- **Principle**: employment income taxable in the country where the activity is carried out.
- **Exception**: temporary missions - employment income remains taxable in the country of residency of the employee if three conditions are cumulatively met:
  1. The employee does not spend more than 183 days in any period of 12 months in another country, AND
  2. the employer is not established in the work country, AND
  3. the salary is not borne by a permanent establishment of the employer in the work country.

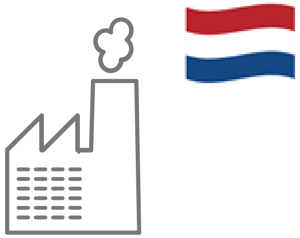
- Separate rules for, among others: directors, supervisory directors, artists and athletes, professors and personnel working on board a ship or aircraft.

- **Conclusion**:
  - If the employee is tax resident of France and is employed by a Dutch company he/she will <u>only</u> be taxable in the Netherlands for the income related to days physically worked from the Netherlands.
  - If the employee is tax resident of the Netherlands and is employed by a French company, he/she will <u>only</u> be taxable in France for the income related to days physically worked in France.

3.2. Example 1 : French resident employee / Dutch employer

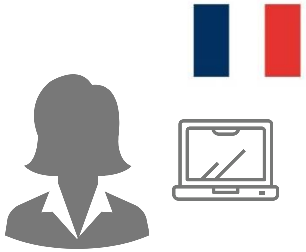
3.2.1. Salary split

- <u>Employee</u>: French tax resident
- <u>Employer</u>: based in the Netherlands
- <u>Total net taxable salary</u>: 5.000 € / month



Work from the Netherlands 3 days / week

Dutch employer must operate a **shadow payroll administration in the Netherlands** to **withhold Dutch wage tax** (Dutch “loonheffing”) on the part of the salary corresponding to days physically worked in the Netherland (i.e. here on 3/5 = 3.000 € / month)



Telework from home in France 2 days / week

Dutch employer must operate an **actual payroll administration in France** to **withhold French wage tax** on the part of the salary corresponding to days physically worked in France (i.e. here on 2/5 = 2.000 € / month)

3.2. Example 1 : French resident employee / Dutch employer

3.2.2. Tax formalities

The Netherlands

- Withholding of Dutch wage taxes (responsibility of payroll department)
- Drafting of the Dutch '*jaaropgaaf*' (responsibility of payroll department)
- Dutch non-resident income tax return (C-form) – deadline 1 July following the income year (responsibility of the tax payer = employee)

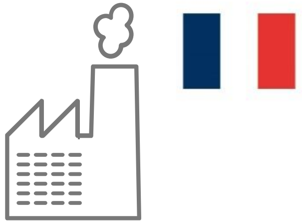
France

- Necessity for Dutch employer to register in France and withhold French wage tax (responsibility of payroll department)
- Exception: if the French employee is not subject to French social security (because he/she spends less than 25% of his worktime in France or has been temporarily assigned abroad from the Netherlands and remains under Dutch social security), the Dutch employer is not obligated to register in France and withhold French wage tax.
- French resident income tax return – deadline around May/June following the income year (responsibility of the taxpayer = employee)

3.3. Example 2 : Dutch resident employee / French employer

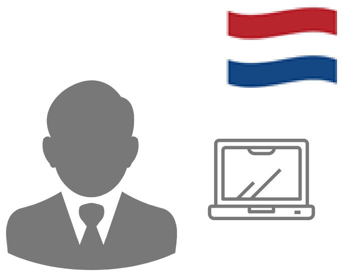
3.3.1. Salary split

- Employee: Dutch tax resident
- Employer: based in France
- Total net taxable salary: 5.000 € / month



Work from France
2 days / week

French employer must operate a **shadow payroll administration in France** to **withhold specific French withholding tax for non-residents** on the part of the salary corresponding to days physically worked in France (i.e. here on 2/5 = 2.000 € / month)



Telework from home in the Netherlands 3 days / week

French employer must operate an **actual payroll administration in the Netherlands** to **withhold Dutch wage tax** (Dutch “loonheffing”) on the part of the salary corresponding to days physically worked in the Netherland (i.e. here on 3/5 = 3.000 € / month)

3.3. Example 2 : Dutch resident employee / French employer

3.3.2. Tax formalities

The Netherlands

- Withholding of Dutch wage taxes and Dutch social security contributions (responsibility of payroll department)
- Drafting of the Dutch '*jaaropgaaf*' (responsibility of payroll department)
- Dutch resident income tax return (P-form) – deadline 1 July following the income year (responsibility of the tax payer = employee)

France

- Withholding of specific French withholding tax applicable for non-residents of France (responsibility of payroll department)
- French non-resident income tax return (if mandatory according to the circumstances) – deadline around May/June following the income year (responsibility of the taxpayer = employee)

3.4. Template travel calendar

TRAVEL CALENDAR 2023

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Employee	
Host country	
Home country	
Assignment start date	
Assignment end date	
Relocation date	

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1	SU			SA			SA			SU		
2				SU			SU		SA			SA
3						SA			SU			SU
4		SA	SA			SU					SA	
5		SU	SU					SA			SU	
6					SA			SU				
7	SA				SU					SA		
8	SU			SA			SA			SU		
9				SU			SU		SA			SA
10						SA			SU			SU
11		SA	SA			SU					SA	
12		SU	SU					SA			SU	
13					SA			SU				
14	SA				SU					SA		
15	SU			SA			SA			SU		
16				SU			SU		SA			SA
17						SA			SU			SU
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19		SU	SU					SA			SU	
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27					SA			SU				
28	SA				SU					SA		
29	SU			SA			SA			SU		
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31												SU

04

Impact on the employer’s corporate income tax: potential risk of permanent establishment

4.1. Teleworking and permanent establishment

According to the FR-NL tax treaty, a Dutch company may create a permanent establishment in France / a French company may create a permanent establishment in the Netherlands if the company has there:

1. A fixed place of business through which its business is wholly or partly carried on

- ➢ The fixed place of business covers any **premises**, whether it is owned, rented, etc. provided it can be regarded as being **at the disposal of the enterprise**
- ➢ The place of business must be "fixed", which supposes a certain degree of permanency.

OR

2. A **dependent agent** (i.e. legally and/or economically) that acts on behalf of the company and habitually exercises in the country an **authority to conclude contracts in the name thereof**

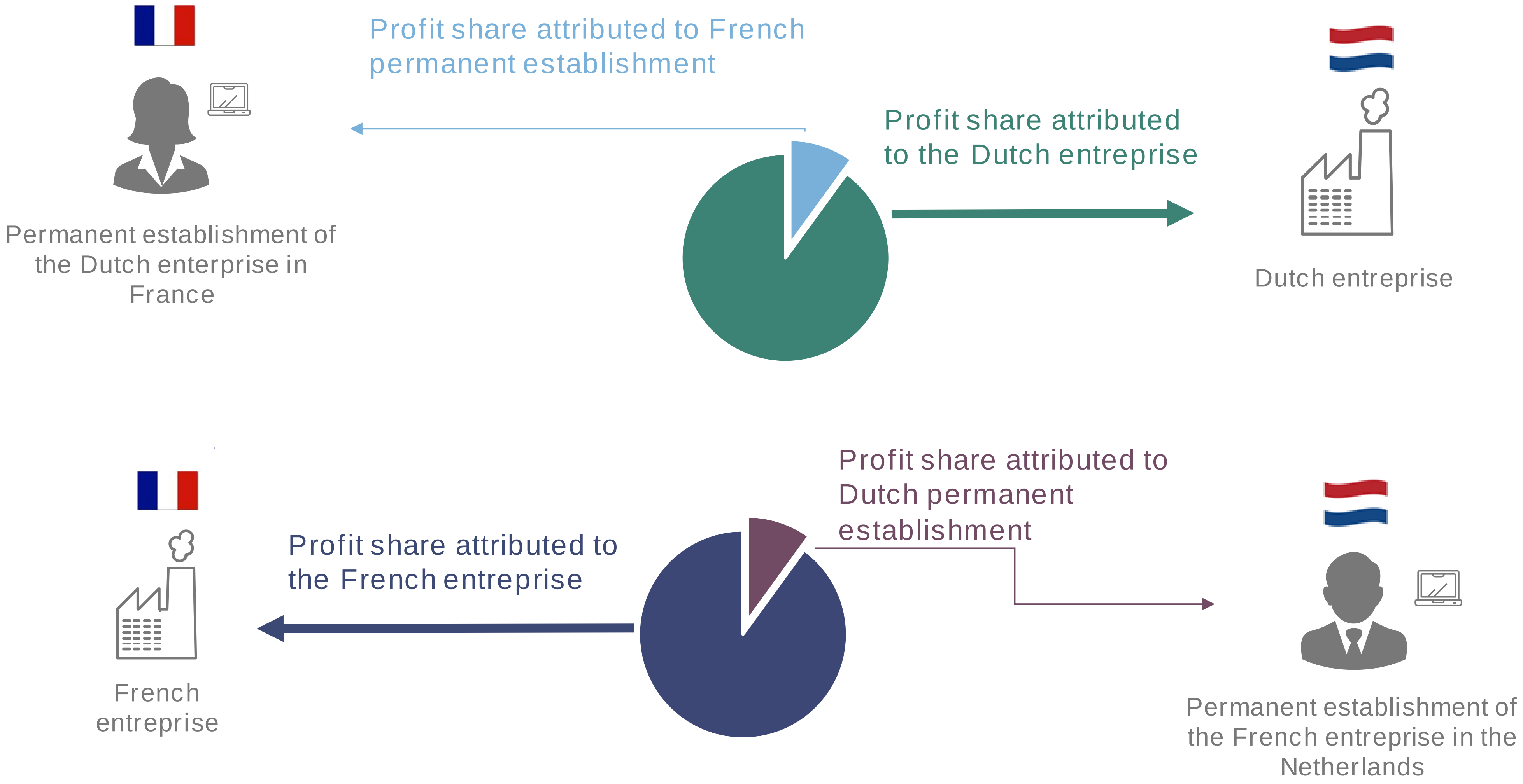
- ➢ For France: Conseil d'Etat, December 11th 2020, "*Conversant International Ltd*": widening of the notion of "dependent agent" (functional approach *vs* formal approach)

Based on the 2017 OECD Commentaries to the Model Tax Convention, the home of a teleworking employee may constitute a fixed place of business, particularly:

- If **the home is used <u>continuously</u>** to carry out the business activity,
- AND if the employer has **<u>forced</u> the employee to telework** (e.g. by not providing an office for the employee on its own premises).

- The OECD Commentaries are only indicative.

4.2. Consequences in case of a permanent establishment



4.2. Consequences in case of a permanent establishment

- Caution: allocation of profits according to a method recognized by <u>both</u> countries
- Issues especially in case of identification of a permanent establishment during a tax audit (*a posteriori*):
  - ➢tax administrations mays assess taxable profit unilaterally
  - ➢statutes of limitation for audits are extended
  - ➢high penalties due to the lack of filing
  - ➢risk of a long litigation with burden of proof on the taxpayer
  - ➢risk of double taxation
  - ➢prosecution for tax fraud

Recommendation: **anticipate !**

- Carry out a permanent establishment analysis
- Determine the profit/loss to be allocated to the permanent establishment
- Make sure that the position chosen is recognized by both countries (rulings are possible)

05

Q&A

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