

# Cross-border impact assessment 2018



The Institute for Transnational and Euregional cross border cooperation and Mobility / ITEM is the pivot of research, counselling, knowledge exchange and training activities with regard to cross-border mobility and cooperation.

Maastricht University

# Cross-Border Impact Assessment 2018

The Institute for Transnational and Euregional cross-border cooperation and Mobility, ITEM, is the pivot of academic research, consultancy, knowledge exchange and training activities concerning cross-border cooperation and mobility.

ITEM is an initiative of Maastricht University (UM), the NEIMED Centre of Expertise on Demographic Changes, Zuyd University, the City of Maastricht, the Euregio Meuse-Rhine (EMR) and the Province of Limburg (NL).



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## 1. Introduction

The Institute for Transnational and Euregional cross border cooperation and Mobility / makes a scientific contribution to cross-border mobility and cooperation. One of its core activities is to analyse border effects in its annual Cross-border Impact Assessments. Since its foundation in 2015, ITEM has conducted three such impact assessments. The present report is the latest edition of the Cross-border Impact Assessment.<sup>1</sup>

Through its Cross-border Impact Assessment, ITEM offers additional insight into European and national legislative and policy initiatives. ITEM's impact assessment intends to provide a valuable resource for policy makers at the regional, national and European level when they make decisions concerning border regions. In particular, these annual impact assessments support the identification of existing or future border effects and thereby contribute to the political debate. Moreover, the results of the individual dossier research also allow timely adjustments to be made to legislative proposals during their adoption phase.

The ITEM Cross-border Impact Assessment serves a dual purpose, namely to recognise potential negative or positive effects of planned legislative or policy initiatives *ex ante* and to identify negative or positive cross-border effects of existing policy or legislation (*ex post*). By fulfilling this purpose, the report can contribute to a better *ex ante* and *ex post* evaluation of legislation and policy for the Member States and regional legislators. Furthermore, the method employed in these impact assessments may be of added value to the European Commission's *ex ante* impact assessment and the evaluation of existing legislation. In this context, the European Commission's Directorate-General for Regional and Urban Policy (DG Regio) considered the Cross-border Impact Assessments carried out by ITEM a good practice in its Communication 'Boosting growth and cohesion in EU border regions'.<sup>2</sup> In that same Communication, the Commission stressed the importance of the identification of cross-border impacts in legislative and policy processes and made it an explicit action point.<sup>3</sup> Awareness of the relevance of cross-border impact assessments is also growing at the national level. For example, the Dutch Secretary of State Knops recently recognised the importance of assessments related to potential cross-border effects during a debate of the House of Representatives.<sup>4</sup>

Various instruments aimed at the assessment of cross-border effects exist at the European and national levels. Examples of such initiatives include the European Commission's Regulatory Impact Assessment, the ESPON Territorial Impact Assessment, and the Impact Assessment Toolkit for cross-border cooperation of the Euroinstitut and the Centre for Cross Border Studies. Each of these initiatives has a different focus and objective. ITEM's Cross-border Impact Assessment is complementary to such existing evaluations. This complementarity of ITEM's report mainly consists of its particular focus on a designated border region.

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<sup>1</sup> All ITEM Cross-border Impact Assessments may be consulted via the following link:

<https://www.maastrichtuniversity.nl/research/institutes/item/research/item-cross-border-impact-assessment>.

<sup>2</sup> Communication from the Commission to the Council and the European Parliament – Boosting growth and cohesion in EU border regions, COM(2017) 534 final, p. 8.

<sup>3</sup> Ibid.

<sup>4</sup> *Kamerstukken II 2017/18, 32851, 47, p. 18-21.*

Conducting in-depth and border-specific impact assessments may be difficult at the European and even at the national level due to the great differences that exist among European border regions. A 2016 study commissioned by the European Commission highlights the needs of border regions according to their particular features and shows the extent to which border regions differ from one another.<sup>5</sup> Therefore, the existing differences in border regions complicate the exercise of European level cross-border impact assessments. At the same time, suggesting that in-depth and border specific impact assessments be carried out at the national level by line ministries may also be a difficult proposition, as the diversity of border regions may also be large at the national level. Germany, for example, has nine neighbouring countries comprising numerous cross-border territories.

Despite these challenges, plenty of action is undertaken at the European and the national levels to tackle them. For example, ITEM experts are currently involved in DG Regio and ESPON projects, which aim at improving the methodologies for EU level Territorial Impact Assessments focused on cross-border territories. When looking at the national level in the Netherlands, the Dutch government is currently discussing how to improve its own policy assessments with regard to border effects with ITEM.

The idea is that cross-border effects should ideally be assessed at all levels: European, national and regional. Considering the large number of border regions and the diversity of their characteristics, there is only so much European and national level impact assessments can map. This gives rise to the need for supplementary small-scale and bottom-up cross-border impact assessments conducted by actors in specific border regions. These in-depth border specific impact assessments could, in turn, contribute to national and European evaluations identifying the cross-border impact of legislation and policy.

ITEM's annual Cross-border Impact Assessment therefore seeks to cater to the existing need for in-depth and border specific impact assessments by evaluating cross-border effects for a wide variety of topics. The present document contains a summary of the results of the 2018 ITEM Cross-border Impact Assessment. This year's impact assessment consists of seven dossiers covering very different topics and researching both existing as well as prospective legislation and policy. Topics ranged from the *ex ante* assessment of the proposed German *Baukindergeld* and the evaluation of the proposed Dutch pilot project on legal cannabis cultivation to the *ex post* assessment of the social security position of the non-standard worker and the analysis of different existing national regulations on retirement age.

## **2. Creating the ITEM Cross-border Impact Assessment: Process and Method**

### **2.1 The Impact Assessment Process**

Despite the differences in topic, researchers of the Cross-border Impact Assessment each apply the methodology developed by ITEM. The research for the impact assessment comprises three stages. In the first stage, the topics to be included in that year's impact assessment are identified by means of a survey which allows stakeholders and other interested parties to inform ITEM about legislation and

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<sup>5</sup> SWECO et al., Collecting solid evidence to assess the needs to be addressed by Interreg cross-border programmes (2015CE160AT044) Final Report 2016, European Commission.

policy having potential cross-border effects. Apart from this survey, topics are also identified following ITEM's core activities, among others, when conducting scientific research, undertaking counselling activities, knowledge exchange and trainings. During the second stage, the ITEM Cross-border Impact Assessment Working Group assesses the suggested topics. During this assessment phase, the working group (consisting of representatives of partner organisations) focuses on the topicality of the issue, the relationship to ITEM's research focus, the number of requests submitted and the frequency of the issue. Once the topics have been identified, the third step may commence meaning researchers initiate their research. This research is documented in separate dossiers which together form the ITEM Cross-border Impact Assessment of that year.

## 2.2 Applying the Method

### Demarcating the Research – What is a Border Region?

Researchers taking part in the Cross-border Impact Assessment follow the same methodology developed by ITEM, which begins with the definition of the border region. As mentioned above, ITEM aims to fill the existing gap calling for more border specific impact assessments. The borders forming the topic of analysis of the ITEM Cross-border Impact Assessment are the cross-border areas surrounding the borders of the Netherlands, Belgium and Germany. This concerns a broad definition relating to the whole of the impact assessment. Different topics may call for a different definition of the border. Therefore, this definition will be refined further in the individual dossiers of this report, as appropriate to the subject. The idea underlying this dossier-based definition of the border is that general observation reveals few if any generic causes of the cross-border effects. These issues are rooted in the national implementation of European law, the level of coordination between the neighbouring countries and the way in which certain national legislation or policy is shaped.

Furthermore, it is important to stress that ITEM strives to maintain a truly cross-border perspective in relation to the border region (as opposed to a national one). The choice for such a perspective is a deliberate one, as it avoids the focus being placed on the national perspective. Doing so may result in a bias favouring one nation's perspective on a certain matter as opposed to representing a genuinely cross-border perspective. In order to represent this perspective as much as possible the starting point for the ITEM Cross-border Impact Assessment is not only the border region of the Netherlands, Belgium and Germany, but especially the cross-border Euregions located within that area.



Figure 1 Cross-border partnerships BE/NL/DE/LU  
Source: DG Regio

Following this cross-border dossier-based definition of the border region, we may see that this year's Cross-border Impact Assessment indeed focuses on a number of different borders within the Netherlands, Belgium and Germany border region. For example, the student team researching the Dutch pilot project on the legal cannabis cultivation looked at the Meuse Rhine Euregion as well as the Rhine-Meuse-North Euregion. The dossier on the qualifying foreign taxpayer obligation (90% rule) instead defined the border region as the Dutch NUTS3/COROP areas located directly along the Dutch-Belgian and Dutch-German borders. The dossier on the social security position of the non-standard worker in turn interprets the term 'border region' broadly. The dossier is therefore aimed at any part of the Netherlands with which cross-border employment activities are possible. In the *Baukindergeld* dossier, the focus was placed on political entities located along the German border such as municipalities, *Landkreise* or districts.

Apart from this territorial demarcation of the border region, researchers also apply any other demarcation relevant to their research.

#### *Identifying the Central Research themes, principles, benchmarks, and indicators*

Cross-border effects come in many shapes and forms. The ITEM Cross-border Impact Assessment focuses on three overarching themes for which cross-border effects are analysed:

1. European integration: the cross-border impact of certain legislation and policy from the perspective of individuals, associations, and enterprises correlated with the objectives and principles of European Integration (i.e. freedoms, citizenship, and non-discrimination);
2. Socioeconomic/sustainable development: the cross-border impact of legislation and policy on the development of the economy in the border region;
3. Euregional cohesion: the cross-border impact of legislation and policy on cohesion and cross-border governance structures in border regions (e.g. cooperation with governmental agencies, private citizens, the business sector, etc.).

The first theme concerns the potential impact of legislation on individuals living and working in border regions. Dossiers focused on European integration consider questions such as the extent to which certain legislative or policy measures violate the principles of non-discrimination and free movement. The dossier on the *Baukindergeld* is an example of a dossier focusing on European integration and non-discrimination. Another example is the question of different retirement ages and the consequences for cross-border workers. A third example is the dossier examining the situation of cross-border workers with non-standard contractual situations. These measures refer to the general question of non-discrimination within a cross-border labour market.

Researchers focusing on the socioeconomic/sustainable development of certain measures adopt a different angle. Their research focuses on questions related to the functioning of the cross-border and Euregional economy. This year's assessment of the tax scheme for workers employed in the Netherlands but living outside the country (90% ruling) is case in point. Another example in the current impact assessment is the ex ante assessment of the intended increase of the Dutch Low VAT rates. Striking questions relate to the possible consequences of the increase for consumers and companies, whether Dutch stakeholders will be confronted with a potentially unfair competitive situation and what this means for investments and employment. The dossier on the Dutch pilot project on legal

cannabis cultivation is another example. In this dossier, researchers evaluated the potential effects of the pilot on socioeconomic and sustainable development by focusing on the impact of the policy on employment and taxation.

Finally, researchers may also ask what cross-border effects a certain measure has for Euregional cohesion, meaning cooperation between institutions, business, contacts, and the mindset of cross-border activities amongst citizens. Such aspects play an important role in the assessment of the relationships between the creation and governance of Euregions and the Euregional mindset of citizens. For example, the team assessing the effects of the pilot project on legal cannabis cultivation assessed the effects of the decriminalisation of the cultivation and sale of cannabis on cohesion in the Euregions Meuse-Rhine and Rhine-Meuse-North. Moreover, the dossier on the social security position of non-standard workers assessed the effects of the existing EU social security regulations on Euregional cohesion.

Dossiers may focus on one of these themes, or all of them, depending on the relevance of the theme for their topic, the scope of their research and the availability of necessary data. The research for the 2018 Cross-border Impact Assessment not only focused on sources stemming from legislation and policy, but also on empirical data gathered by specialised institutions and the researchers themselves. For example, the dossier on the qualifying foreign taxpayer obligation (“90% rule”) based their research on data from Statistics Netherlands (CBS).

After selecting the research themes pertaining to their dossier, researchers identify the principles relevant to their dossier. These principles subsequently provide the basis for the development of benchmark criteria and ultimately indicators used to review whether legislation or other rules might facilitate or impede best practices. Table 2 below provides examples for principles, benchmarks and indicators for the three research themes of the ITEM Cross-border Impact Assessment.



**Table 2: Examples of principles, benchmarks, and indicators**

Research themes	Principles	Benchmark	Indicators
1. European integration	European integration, European citizenship, Non-discrimination	No border controls, open labour market, facilitated recognition of qualifications, adequate coordination of social security facilities, taxes	Number of border controls, cross-border commuting, duration and cost of recognition of diplomas, access to housing market, etc.
2. Socioeconomic /Sustainable development	Regional competitive strength, Sustainable development of border regions	Cross-border initiatives for establishing companies, Euregional labour market strategy, cross-border spatial planning	Euregional: GDP, unemployment, quality of cross-border cluster, environmental impact (emissions), poverty
3. Euregional cohesion	Cross-border cooperation/Good Governance, Euregional cohesion	Functioning of cross-border services, cooperation with organizations, coordination procedures, associations	The number of cross-border institutions, the quality of cooperation (in comparison to the past), development of Euregional governance structures, quantity and quality of cross-border projects

### 2.3 The Dossiers of the 2018 ITEM Cross-border Impact Assessment

The survey for this year’s impact assessment was conducted between November 2017 and January 2018 and was set out among ITEM stakeholders and other interested parties. ITEM received 12 responses to this questionnaire from various partners. Additionally, a number of topics were proposed in the context of ITEM’s day-to-day activities and two topics were identified following a quick scan conducted by ITEM. After the dossiers and subjects submitted were screened, six dossiers were ultimately selected by the Cross-border Impact Assessment Working Group. The final dossiers are the result of a fruitful cooperation of ITEM, its researchers and its partners. As was the case for the 2016 and 2017 impact assessments, the research in some dossiers was rendered possible by the efforts of several students. Table 3 below provides an overview of the topics and research of the ITEM Cross-border Impact Assessment 2018 dossiers.

**Table 3: Themes of the ITEM Cross-border Impact Assessment 2018**

No.	Subject	Specification
<b>Dossiers</b>		
1.	Exploring the cross-border effects of the low VAT increase in the Netherlands	The dossier explores the potential cross-border effects of the increase of the low VAT in the Netherlands. The research focused on providing an <i>ex ante</i> estimation of the economic consequences of the increase.
2.	The qualifying foreign taxpayer obligation (“90% rule”): A preliminary <i>ex-post</i> impact assessment	Researchers aimed at examining trends over the 2013-2016 period to see if notable changes occurred in the number and composition of non-resident employees in the Netherlands after the 90%-rule came into force.
3.	Regulations on retirement age NL/BE/DE: A multidisciplinary analysis	The dossier consists of an analysis of the border effects of different national regulations on retirement age. The analysis is multidisciplinary in that it includes several perspectives (taxation, social security and pensions).
4.	<i>Baukindergeld</i>	<i>Ex ante</i> research on the proposed German <i>Baukindergeld</i> . The dossier examines the cross-border effects of the measure in-depth and explores possible solutions to improve the legal regime for frontier workers.
5.	The social security of the non-standard worker: A national and European challenge	The dossier assesses the position of the non-standard worker by analysing existing legislation on social security ( <i>ex post</i> ).
<b>Student dossiers</b>		
6.	The potential effects of the ‘Experiment gesloten cannabisketen’ on the Euregions Meuse-Rhine and Rhine-Meuse-North	The dossier comprises an <i>ex ante</i> assessment of the cross-border effects connected to the proposed Dutch pilot project on legal cannabis cultivation.

### 3. Dossiers

#### 3.1 Exploration of the cross-border impact of an increase in the low VAT rate in the Netherlands

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# Exploration of the cross-border impact of an increase in the low VAT rate in the Netherlands<sup>6</sup>

## 1. Introduction

The coalition agreement of the Rutte-III government sets out the intention to raise the low VAT rate from 6% to 9% effective 1 January 2019.<sup>7</sup> The government expects to generate EUR 2.6 billion annually through increased taxation of, among other things, foodstuffs, medicines and haircuts.<sup>8</sup> These revenues will be used to fund the planned reduction in income tax, also due in 2019.<sup>9</sup> These measures do not stand alone however. For a long time, Dutch economists have been pressing for two measures in various extrapolations of the Dutch tax system:<sup>10</sup> firstly, a move away from direct taxation of wages to indirect taxation of consumption, and, secondly, closing of the gap between the low VAT rate and the standard VAT rate. By raising the low VAT rate, the coalition agreement seems to be following this line of reasoning, while partially implementing both recommendations.

The debate about tax reforms and the VAT rate primarily seems to be considered a national issue, separate from the policies in our neighbouring countries and at European level. The present situation, however, of a European internal market that simultaneously leaves its Member States substantial freedom to set their own VAT rates, can lead to significant rate differences between Member States. Especially in border regions, these differences can lead to changes in the competitiveness of businesses in neighbouring countries, as well as changes in cross-border consumer spending. For these reasons, it is wise not merely to consider the planned VAT increase in its Dutch context, but to incorporate it in the present European debate on the VAT system. A definitive European VAT policy is being extensively debated within the European Union, with further harmonisation of VAT rates an important point of contention. It is clear that both the Dutch and the European VAT policies have specific consequences for border regions. The planned increase in the low VAT rate can, for instance, deteriorate the competitiveness of Dutch businesses in the border region and cause a shift in consumption to Germany and Belgium. No ex-ante analysis of the temporary and structural border effects of this measure has been carried out to date.<sup>11</sup>

In this study, we explore the potential border effects of the proposed increase of the low VAT rate with 3 percent point, i.e. from 6% to 9%. Appendix D to this study contains an ITEM Quick Scan testing the border effects in a broad sense. As a logical follow-up to this Quick Scan, this study focuses on the economic effects of shifts in spending and changes in competitiveness as referenced in Theme 2 in Appendix D, rather than on the aspects of EU integration (cf. Theme 1) or Euregional cohesion (cf. Theme 3). The question that is central to this study concerns the scope and size of the border effects

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<sup>6</sup> The authors wish to thank Anouk Bollen, Veronique Eurlings, Matthijs Huizing and Martin Unfried for their suggestions and comments regarding earlier versions of this report.

<sup>7</sup> *Vertrouwen in de toekomst* (Rutte-III Coalition Agreement), 2017, p. 63, 65.

<sup>8</sup> *Vertrouwen in de toekomst* (Rutte-III Coalition Agreement), 2017, p. 63.

<sup>9</sup> 'De ruimte om de belastingen op inkomen nog verder te verlagen wordt gevonden door een verhoging van het lage BTW tarief van 6% naar 9%, ...' ('The leeway to further reduce the taxation of income is achieved by raising the low VAT rate from 6 to 9 percent, ...')(*Vertrouwen in de toekomst* (Rutte-III Coalition Agreement), 2017, p. 35).

<sup>10</sup> See Section 2.2 of this report.

<sup>11</sup> The Senate motion proposed by Barth et al. (EK 34.775 / 34.785, K) requested exploration of the effects of the VAT increase, paying specific attention, among other things, to self-employed entrepreneurs in border regions. This motion was tabled on 5 December 2017 and rejected in a vote on 19 December 2017.

of this VAT measure for consumers, businesses and the state. To this end, we have investigated the following sub-questions:

1. How many consumers in the border regions are potentially affected by the VAT increase, and what is the impact on the competitiveness of businesses and the tax revenues of the state in the border regions?
2. To what extent does a VAT increase lead to a price increase for consumers, and will this increase be greater or smaller than the Dutch average in border regions?
3. What is the potential impact of a price increase on shifts in turnover and purchase flows between the Netherlands, Belgium and Germany, as well as on profit margins and employment in businesses?

We start this study with a general introduction on the VAT and the planned increase of the low VAT rate in the Netherlands. We approach this measure in light of the Dutch as well as the European debate and in relation to the future of the VAT system. Section 3 subsequently focuses on previous academic studies that can teach us more about the potential occurrence of border effects, particularly about the extent to which prices rise following higher turnover tax rates. In Chapter 4, we study the current situation in the Dutch border regions. By combining a number of empirical datasets, we can produce a crude estimate of the border effects that may arise from the planned VAT increase. In empirical research, a 'border region' is commonly assumed to include an area within 30 km from the national border with either Belgium or Germany or, using a narrower definition, an area within 10 km from the national border. We address, among other issues, the additional tax revenues from the rate increase, the current price differences between the Netherlands, Belgium and Germany, and the price differences between supermarkets selling products that predominantly fall under the low VAT rate. We revisit the above questions in the concluding chapter, where we make a number of recommendations for follow-up research, with a view to potential future VAT policy within the European Union.

## 2. The VAT system and recent amending proposals

### 2.1 VAT history

VAT, in full: 'value added tax', is a tax on the sale of goods and services. The present VAT system has been in existence since 1969, when the still-effective '*Wet op de omzetbelasting 1968*' (1968 Turnover Tax Act) was introduced. The first European rules on turnover tax led to the introduction of the VAT system<sup>12</sup> and implied a transition to a system of taxation on the basis of added value for the Netherlands.<sup>13</sup> According to this system, the government charges a certain percentage in tax for the sale of a good or service, which in the Netherlands is often included in the consumer sales price.<sup>14</sup> Businesses can offset the VAT tax paid on their purchases against the VAT tax received through sales.

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<sup>12</sup> First Council Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (67/227/EEC).

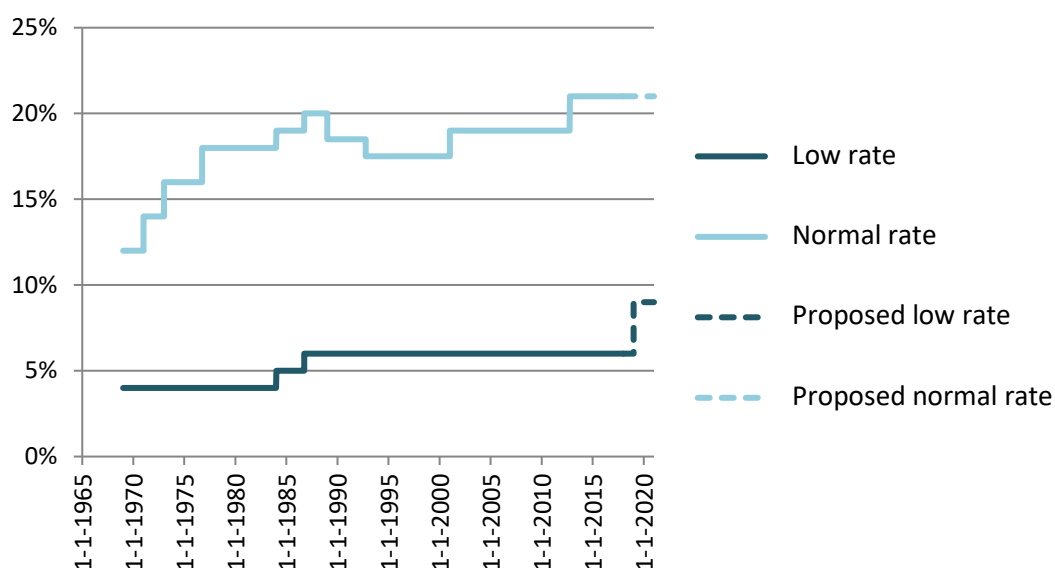
<sup>13</sup> The Netherlands used to have a cascade system in place to this end, where turnover tax was levied on each transaction, which could not be reclaimed from the tax authorities.

<sup>14</sup> This rate is calculated on top of the actual sales price. In the Netherlands it is customary, however, to include this tax in the consumer sales price. Thus, 6/106th part of the sales price of a good or service falling under the low VAT rate consists of VAT.

This effectively puts the VAT burden entirely on the end user, usually the consumer. The Netherlands uses different VAT rates as well as VAT exemptions for certain goods and services.

At the introduction of the VAT system in 1969, the standard rate was 12% and the low rate 4%. Figure 1 shows that these rates were adjusted several times, most recently in 2012, when they increased to 21% and 6% respectively. The standard rate applies to both regular and luxury goods and services, contrary to the low VAT rate, which mainly covers goods and services seen as basic necessities of life.<sup>15</sup> Agricultural goods, foodstuffs<sup>16</sup>, medicines and books, for instance, thus fall under the low rate. In addition, a number of services fall under the low VAT rate as well, such as various repair services (e.g. of clothing, footwear, bicycles), hairdressing, passenger transport, accommodation, and leisure events. Finally, a number of specific goods and services have been exempt from VAT, such as health care and education. This also means, however, that the VAT paid in the creation of those goods and services cannot be offset.<sup>17, 18</sup>

Figure 1: Dutch VAT rates since the introduction in 1969



Source: European Commission (2018), *VAT rates applied in the Member States of the European Union*; own visualisation.

## 2.2 Recent debate about indirect taxes and VAT

Over the past few years, a number of reports have appeared that contain reflections on future reforms of the tax system and specifically the VAT system.<sup>19</sup> Two recommendations recur in almost every

<sup>15</sup> In addition, a number of goods and services, such as certain repair services, have been included in this category to counter undeclared work.

<sup>16</sup> Except foodstuffs subject to excise duties, such as alcoholic beverages and tobacco.

<sup>17</sup> See Tables I and II annexed to the 1968 Turnover Tax Act for an extensive overview of the goods and services falling under the low and zero rate respectively.

<sup>18</sup> In addition, the Netherlands has a 0% rate, the nil rate, for a number of specific goods and services, such as airplanes and goods and services destined for export. Contrary to goods and services that are VAT exempt, entrepreneurs can obtain refunds from the Tax Authority of previously paid VAT when selling these nil-rate goods.

<sup>19</sup> See, inter alia: PBL (2016), *Belastingverschuiving: meer vergoening en minder complexiteit? Verkenning van trends en opties*, Den Haag; Commissie inkomstenbelasting en toeslagen (2012), *Naar een activerender belastingstelsel Interimrapport*, Den Haag; Commissie inkomstenbelasting en toeslagen (2013), *Naar een activerender belastingstelsel Eindrapport*, Den Haag; IMF (2016), *Kingdom of the Netherlands –Netherlands Staff report for the 2016 article IV consultation*, p. 10; CPB

report: First of all, most reports advocate a shift from the direct taxation of wages to the indirect taxation of consumption, like the VAT. VAT is claimed to have a less disruptive effect on the economy than income tax, while also being a stable and future-proof source of income. The second recurring recommendation is to use one standard VAT rate as much as possible and to keep at a minimum the number of goods and services that fall under the lower rate. Here, too, it is argued that this measure will be less disruptive to the economy, thus increasing welfare. In addition, some studies argue why having low VAT rates would be inefficient for redistribution purposes or for encouraging healthy or sustainable consumption and how these aims could be achieved more efficiently through other measures.<sup>20, 21</sup>

It is noteworthy that these studies are mainly theoretical in nature and conducted under the assumption of an 'ideal world', i.e. without policy restrictions and side effects. As such, they fail to take into account European legislation, which leads to recommendations, such as the abolition of VAT exemptions and other unilateral amendments, that are not feasible under the current European directives. In addition, the unilateral implementation of both recommendations will lead to major cross-border price differences. However, these border effects are rarely calculated or taken into account in discussing the future of the tax system and the VAT.

### **2.3 VAT in the election programmes and the coalition agreement**

Given the recommendations in previous studies of the tax system and the VAT rates, the measures announced in the coalition agreement of the Rutte-III government are hardly surprising. It is striking, however, that the parties who co-wrote the coalition agreement left the VAT virtually untouched in their election programmes and the corresponding financial audits of these programmes by the Netherlands Bureau for Economic Policy Analysis (CPB). Only the *ChristenUnie* (a Christian party) proposed a few changes: the simultaneous reduction of the standard rate to 19.5% and abolishment of the low rate for anything but foodstuffs. The election programmes of the other elected parties only contained mild VAT measures. GroenLinks (the Green party), the PvdD (an animal welfare party) and the SGP (another Christian faction) included partial abolition of the low rate in their election programmes while the SP (a socialist party) advocated a reduction in the standard rate from 21% to 19%.

Though it remains unclear who ultimately took the initiative for the planned measures, it is clear that the plans in the coalition agreement are broadly in line with the recommendations discussed above. The coalition agreement includes, for example, an increase of the low VAT rate from 6% to 9% as of 1 January 2019. If businesses pass this VAT increase on to the customers, retail prices will rise by 2.83%, i.e.  $(109-106) / 106 * 100\%$ . According to calculations by the Netherlands Bureau for Economic Policy

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(2014), *Bouwstenen voor een moderne BTW*, Den Haag; Studiecommissie belastingstelsel (2010), *Continuïteit en vernieuwing, een visie op het belastingstelsel*, Den Haag.

<sup>20</sup> As regards the argument of economic redistribution: it has been shown that lower income classes comparatively do not use the lower VAT rate more than higher incomes. However, even if lower classes benefited comparatively more from the lower VAT rates, economic redistribution could still be achieved more efficiently through other tax measures, such as income tax, that entirely benefit the lower income classes than through a low VAT rate that also benefits higher incomes. Cf. Commissie inkomstenbelasting en toeslagen (2012), *Naar een activerender belastingstelsel Interimrapport*, Den Haag.

<sup>21</sup> Studies such as the PBL report (2016) argue that the taxation of environmental damage through VAT is inefficient as the damage is only charged indirectly later in the chain. Environmental damage can be better prevented by acting at the time when that damage is being inflicted through immediate taxation of that damage.

Analysis (CPB), this measure will yield EUR 2,613 million annually, 25% of which will be paid by businesses and the other 75% by consumers.<sup>22</sup> This is equivalent to an average price rise of more than 2% for consumers (2.12% = 75% \* 2.83%). This calculation, however, does not take into account any border effects that may occur as a result of this measure. A call by the Senate for further research into the potential border effects of the measure was rejected by the coalition parties. The Secretary of State for the Treasury reported during the debate that estimates on sub-national level are difficult to make and referred to an estimate by an official working group suggesting that the border regions will not show large deviations from the national average.<sup>23</sup> At the same time, the publication of the measure elicited many responses from various sectors as well as the border regions. Politicians and entrepreneurs reported that they certainly did expect substantial border effects.<sup>24</sup>

## 2.4 European VAT policy

The debates on tax reform and the VAT rate are predominantly considered national issues in the Netherlands. The present VAT system is, however, largely based on European rules. The rules on turnover taxes were considerably harmonised with the formation of a common internal market during the second half of the twentieth century.<sup>25</sup> In 1967, a decision was made to introduce a similar system of turnover tax throughout the Union. This was laid down in binding instructions via the Sixth Directive, which has seen several updates since.<sup>26</sup> The guiding principle of this system was that the VAT rate in the country of residence of the selling party would apply to any cross-border sales, also known as the 'country-of-origin principle'. This meant, for example, that an entrepreneur residing in the Netherlands and selling goods to a German buyer had to charge the Dutch VAT rate. Member States would then settle the VAT payments through a clearing system, i.e. by netting. This created a need for far-reaching harmonisation of VAT rates, as rate differences would otherwise lead to distortion of competition. Since this far-reaching harmonisation of rates was not possible in the short term, however, a temporary system was introduced, in which export was exempt from VAT and import was charged with the rate applicable in the importing country, thus de facto creating a system based on the VAT rates in the country of purchase. In the early 1990s, as customs controls were abolished, a number of rules were introduced aimed at bringing the rates closer together. The standard VAT rate, for example, has to be at least 15% in each Member State. In addition, Member States can have one or two reduced rates. The European Commission has added to its guidelines a list of goods and services

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<sup>22</sup> The assumption that entrepreneurs will pay one-fourth of this increase implies that they will not (or will not be able to) fully pass on the increase of the low VAT rate to consumers through the selling price, leading to lower profits on their part. The higher VAT payments by businesses are based on a higher VAT rate, probably at lower sales volumes. Consumers will account for the bulk of the government's VAT revenues by paying higher sales prices.

<sup>23</sup> In this context, Secretary of State Snel reported the following in a debate: 'De inschatting van de ambtelijke werkgroep [ambtelijke stuurgroep fiscaliteit] was uiteindelijk dat een prijsstijging van 3%, waarvan we dus nog niet weten of die ook in de prijs tot uitdrukking gaat komen, geen grote verandering in de samenstelling van het pakket aan goederen in de grens met zich mee zou brengen.' (*The final estimate by the official working group [i.e. the Official Steering Group on Taxation] was that a price increase of 3%, the reflection of which in the price is still uncertain, would not bring about any major changes to the composition of the range of goods at the border.*) See: Senate report EK 2017/2018, no. 12, item 7.

<sup>24</sup> See for example: <https://www.telegraaf.nl/financieel/2133686/duizenden-mkb-ers-dupe-btw-verhoging> and <https://www.khn.nl/nieuwsberichten/2018/06/onderzoek-panteia-btw-verhoging-leidt-vooral-in-grensstreken-tot-fors-omzetverlies>; for some of the responses from Limburg, see: <https://www.1limburg.nl/btw>.

<sup>25</sup> See, for example, the white paper *Completing the European Market* published by the European Commission in 1985 for a retrospective of the steps taken until then and the intentions for the years after.

<sup>26</sup> Sixth Council Directive of 17 May 1977 on the harmonisation of legislation of Member States relating to turnover taxes (77/388/EEC); First Council Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (67/227/EEC).



eligible for the low(er) rate(s). Member States must decide for each (sub)category whether they will opt for the low rate or apply the standard rate.

Table 1: Turnover tax rates in the Netherlands, Belgium, and Germany on 01/01/2018

	Low Rate*	Standard rate
Belgium	6% / 12%**	21%
Germany	7%	19%
Netherlands	6% (9%)***	21%

Remarks:

\* The categories of goods and services that fall under the low rate differ from country to country. Certain goods may thus fall under the low rate in the Netherlands and under the standard rate in Belgium and vice versa (see Appendix A).

\*\* Contrary to Germany and the Netherlands, Belgium applies two low rates for turnover tax. The medium rate of 12% is only applied to certain subcategories of foodstuffs, of social housing and of raw materials for agriculture (see Appendix A).

\*\*\* The Dutch government intends to increase the low VAT rate to 9% as of 1 January 2019.

Source: European Commission (2018), *VAT rates applied in the Member States of the European Union*.

This European directive has kept the differences in turnover tax between us and our neighbouring countries relatively modest. The different rates are included in Table 1. Germany has a standard rate of turnover tax of 19% and one low rate of 7%. The standard rate in Belgium is 21%, with low rates of 12% and 6%. All three countries make frequent use of the possibility of classifying goods and services under the low VAT rate or granting an exemption. It is clear that the planned increase in the low VAT rate as of 1 January 2019 will put the Dutch low VAT rate above that in Germany and above the lowest VAT rate in Belgium. The precise classification of goods and services differs per country however. Appendix A presents an overview of 32 categories of goods and services based on the information from the European Commission. Even within these categories, however, there are still plenty of exceptions. It is noteworthy that the Netherlands uses the low VAT rate for a relatively large number of categories. As a result, tax rates in the Netherlands are lower than in Belgium and/or Germany in a number of categories, such as certain foodstuffs, tickets to theme parks, and repair services. Due to the relatively wide application of the low VAT rate in the Netherlands, the increase of this rate will affect many goods and services. Purchasing this large group of goods and services will thus become less attractive in the Netherlands and relatively more attractive in the German and Belgian border regions.

## 2.5 Recent debate on the European VAT system

The introduction of a turnover tax system was one of the first and greatest milestones of the European Union. A stalemate has recently arisen however: while the current system was supposed to be only temporary in nature, there is little willingness among Member States to further harmonize VAT rates. As a consequence, a transition to a definitive system based on taxation in the country of sale has gotten out of reach. At the same time, the current system has its drawbacks: many of the rules are decades old and outdated due to technological developments, among other things. In addition, the current system with its exemptions for export is sensitive to fraud, known as VAT carousel fraud. The disadvantages of the current temporary system and the reluctance of the Member States and the European Parliament to take steps in the direction of the proposed system of taxation in the country of sale (the country of the supplier, i.e. the export country) rather than the country of purchase, i.e. the importing country, have eventually forced the European Commission to change its course. In 2011

the Commission suggested a transition to a definitive VAT system based on taxation in the country of purchase.<sup>27</sup> This means that the supplier shall charge VAT at the rate applied in the buyer's Member State on goods exported within the European Union. In the future, suppliers situated in the Netherlands will thus have to invoice German VAT rates to customers located in Germany. According to the plans of the European Commission, suppliers can subsequently offset the payable VAT against the VAT paid on purchases in the EU through a one-counter solution in their Member State of establishment.

This change in course, which was further fleshed out with additional plans in 2017 and 2018<sup>28</sup>, makes it possible to relax the rules regarding the harmonisation of VAT rates, as harmonized VAT rates are not required in a VAT system based on rates in the country of purchase. The introduction of the new VAT rules, scheduled for 2022, will thus broaden the scope for national governments to set their own rates, with differences in rates likely to increase. The European Commission notes that cross-border purchases by consumers will constitute one of the main exceptions to the system of VAT payment in the country of purchase as the VAT rate of the selling party will apply to cross-border purchases by consumers. The existing market disturbance in border regions due to different VAT rates is very likely to increase through the flexibilisation of rates under the New European VAT regime. The European Commission has indicated, however, that this disturbance will have low priority as its size will be negligible compared to total VAT revenues.<sup>29</sup>

### **3. Border effects of changing VAT rates**

#### **3.1 Border effects of a VAT increase**

The impact of the planned increase in the low VAT rate will be felt throughout the Netherlands. Companies will completely or partly pass the VAT increase on to consumers through pricing. Consumers may then decide to reduce their consumption of these products, possibly by switching to other goods or services. The extent to which consumers will actually do this, i.e. the price elasticity of the demand for these products, determines how much revenue Dutch entrepreneurs will lose on low VAT products through the VAT increase. Consumers have another option as well: to spend abroad. This option becomes more attractive as consumers live closer to the border but means additional loss of income for businesses in the border regions. The size of this additional loss will be determined by the willingness of consumers to move their spending to a foreign country, where prices will be relatively lower after the VAT increase.<sup>30</sup> Another important factor will be the reduced willingness of foreign consumers to spend money in the Netherlands, which will have become relatively more

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<sup>27</sup> Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the future of VAT - *Towards a simpler, more robust and efficient VAT system tailored to the single market* (COM(2011) 851 of 6.12.2011).

<sup>28</sup> Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the follow-up to the Action Plan on VAT — *Towards a single EU VAT area — Time to act'* (COM(2017) 566 of 4/10/2017); Proposal for a Council Directive amending Directive 2006/112/EC as regards harmonising and simplifying certain rules in the value added tax system and introducing the definitive system for the taxation of trade between Member States' (COM(2017) 569 of 4/10/2017); and the Proposal for a Council Directive amending Directive 2006/112/EC as regards rates of value added tax (COM(2018) 20 of 18/01/2018).

<sup>29</sup> See, among other sources: Commission staff working document impact assessment accompanying the document Proposal for a Council Directive amending Directive 2006/112/EC as regards rates of value added tax (COM(2018) 20 of 18.1.2018).

<sup>30</sup> This, too, may be attributed to the price elasticity of demand. The border effect ensures that price elasticity is higher as the entrepreneur's sales outlet is closer to the border.

expensive. These shifts in spending will directly benefit businesses on the other side of the border, so that the planned VAT increase may impact the level playing field for businesses. The position of businesses in the Dutch border region can deteriorate relative to Dutch businesses elsewhere in the country that do not face any border effects, as well as relative to businesses in the German and Belgian border regions, which, conversely, will benefit from the border effects.<sup>31</sup>

Consumer decisions whether to purchase in the Netherlands or abroad are influenced by many factors, such as the opening hours of shops, the atmosphere, the quality of the products and the language spoken.<sup>32</sup> Price differences between the Netherlands and foreign countries matter less as these factors gain importance in the purchasing decision. They nevertheless seem to play a large role in many purchases.<sup>33</sup> Several studies have examined the extent to which price differences can tempt consumers to spend their money across the border.<sup>34</sup> The general assumption is that the willingness to benefit from price differences decreases as the (potential) consumers live further away from the border. The greater the distance to the border, after all, the higher the extra transport and time costs associated with cross-border spending. From a certain distance, these costs will start outweighing the price benefits, which are static. The terms high price sensitivity or large price elasticity of demand are used when consumers are very sensitive to price differences, i.e. start moving their spending even when price differences are small. Large price elasticity of demand is detrimental to businesses in the border region as it limits their options to pass the VAT increase on through pricing.

Entrepreneurs in border regions face tough choices if consumers are strongly inclined to move their spending abroad in response to price changes. They can opt for passing on the tax increase through pricing and thus possibly lose part of their clientele. They can also choose not to increase prices, which would negatively affect their profit margins. It is clear that a strong sensitivity to price among consumers, i.e. high price elasticity of demand, is detrimental to the competitiveness of businesses in the border region. Companies will be less inclined to pass on the VAT increase as price elasticity is higher. The price sensitivity of consumers is expected to decrease further inland. The absolute size of the border effect, measurable by lower domestic spending and lost tax revenues due to cross-border purchases in the border regions, depends on price changes, the price elasticity of demand, the size of the population and its spending patterns in the border regions.

### **3.2 Price elasticities at the border**

A shift towards spending abroad as a result of the planned VAT increase in the Netherlands will only occur if the existing price differences change. Changes in VAT rates do not automatically lead to changes in price. Although it is often assumed that businesses will fully pass on any increases in

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<sup>31</sup> Theoretically, foreign businesses may also suffer turnover losses due to the planned VAT increase as consumers might decide to keep spending their money in the Netherlands despite the higher domestic prices and thus have less money left for purchases abroad. Consumers are expected, however, to move their spending to then (relatively) cheaper locations abroad.

<sup>32</sup> See, for example, BRO (2009), *Grenzeloos winkelen*, and Spierings, B., & Van Der Velde, M. (2008), Shopping, borders and unfamiliarity: Consumer mobility in Europe, *Tijdschrift voor Economische en Sociale Geografie*, 99(4), 497-505.

<sup>33</sup> See BRO (2009), *Grenzeloos winkelen*, p. 16.

<sup>34</sup> Asplund, M., Friberg, R. & Wilander, F. (2007), Demand and distance: evidence on cross-border shopping. *Journal of public Economics*, 91(1-2), 141-157; DeCicca, P., Kenkel, D. & Liu, F. (2013), Excise tax avoidance: the case of state cigarette taxes, *Journal of Health Economics*, 32(6), 1130-1141; Leal, A., Lopez-Laborda, J. & Rodrigo, F. (2010), Cross-border shopping: a survey, *International Advances in Economic Research*, 16(2), 135-148.

turnover tax through pricing, Benedek, De Mooij, Keen & Wingender (2015) show that the percentage of the rate change that is passed on may differ strongly across products and services within the eurozone.<sup>35</sup> In some cases, virtually nothing is passed on to the consumer, while in other cases the entire increase is passed on. Besley & Rosen (1999) even show 'overshifting' for various foodstuffs, whereby the price increase exceeds the tax increase.<sup>36</sup> The Netherlands Bureau for Economic Policy Analysis (CPB) assumes that 75% of the rate increase will be passed on to the consumer. Jongen, Lejour & Massenz (2018) calculated this so-called 'pass-through' rate for the Dutch hairdressing industry, which saw a VAT reduction of 17.5% to 6% in 2000, introduced to stimulate the demand for labour-intensive services and thus boost (official) employment in these services. They find that the VAT reduction was almost fully passed on but do not find any effects on turnover or employment. They further note that international studies reveal a large bandwidth in the range of identified values of this 'pass-through' rate and that cost increases, such as the VAT rate but also purchasing costs, are generally passed on more keenly than price reductions, constituting asymmetry.<sup>37</sup>

The above studies and the Netherlands Bureau for Economic Policy Analysis (CPB) focus on general, national effects, whereas the situation in the border region may be expected to diverge. Harding, Leibtag & Lovenheim (2012) find proof that American businesses in the border regions pass on changes in indirect taxation, in their case: excise duties on cigarettes, to a lesser extent than businesses further away from the border.<sup>38</sup> A study by Bergman & Hansen (2017) on the passing on of changes in the Danish tariffs on alcohol and soft drinks also finds this divergent effect on price in the border region between Denmark and Germany.<sup>39</sup> There are large empirical differences, however, in the passing on of any increases in turnover tax. These differences make it difficult to estimate the extent to which the planned VAT increase in the Netherlands will lead to price increases in the border region, but, based on international studies, businesses in the border regions may be expected to increase prices less rapidly than businesses elsewhere in the country. This will be especially relevant if businesses on the Dutch side of the border take into account that the businesses on the other side of the border will not be raising their prices following the increase in the low VAT rate in the Netherlands.

An interesting example of a study on the willingness of consumers to spend across the border is Asplund, Friberg & Wilander (2007).<sup>40</sup> They looked into alcohol consumption in Sweden in relation to the (lower) price of alcoholic beverages in Denmark. They show that the consumption of alcohol in Sweden indeed moves along with price differences, often caused by changes in excise duties on alcohol. They also show that Swedes who live near the border drink much more alcoholic beverages from Denmark than those who live further away from the border. They find a (cross-)price elasticity of demand of 0.17 to 0.47 for border residents, depending on the type of alcoholic beverage involved. This means that a 10% drop in Danish prices will reduce the consumption of alcoholic beverages in

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<sup>35</sup> Benedek, D., De Mooij, R., Keen, M. & Wingender, P. (2015), *Estimating VAT Pass Through*, IMF Working Paper 15/214.

<sup>36</sup> Besley, T. & Rosen, H. (1999), Sales Taxes and Prices: an Empirical Analysis, *National Tax Journal*, 52(2): 157-178.

<sup>37</sup> Jongen, E., Lejour, A. & Massenz, G. (2018), Cheaper and More Haircuts After VAT Cut? Evidence from the Netherlands. *De Economist*, 166:135-154.

<sup>38</sup> Harding, M., Leibtag, E. & Lovenheim, M.F. (2012), The heterogeneous geographic and socioeconomic incidence of cigarette taxes: evidence from Nielsen Homescan Data, *Am Econ J Econ Policy*, 4(4):169-198.

<sup>39</sup> Bergman, U.M. & Hansen, N.L. (2017), *Are Excise Taxes on Beverages Fully Passed Through to Prices? The Danish Evidence*.

<sup>40</sup> Asplund, M., Friberg, R. & Wilander, F. (2007), Demand and distance: evidence on cross-border shopping. *Journal of Public Economics*, 91(1-2), 141-157.

Sweden by between 1.7% and 4.7%.<sup>41</sup> This effect wanes, however, as people live further away from the Danish border. Even hundreds of kilometres from the border, however, the quantity of alcohol sold still shows slight dependence on Danish prices.

Although the study by Asplund, Friberg & Wilander (2007) provides interesting indications of border effects, the academic literature also reveals that elasticity towards the foreign price varies strongly across different products and the location of the border regions. Banfi, Filippini & Hunt (2005) show, for example, that a 1% increase in fuel prices leads to a 1.75% fall in turnover in the Swiss regions on the border with France, Italy or Germany, while in other studies, an increase in indirect taxes hardly affects sales in the border regions at all (cf. Leal, López-Laborda & Rodrigo (2010) for an extensive overview of studies).<sup>42</sup> These differences in price elasticity can partly be explained by the specific characteristics of the region or the relevant product. Likewise, Jansen & Jonker (2016) can barely demonstrate any statistically significant effects of varying price differences between petrol stations on both sides of the Dutch border on fuel tourism among Dutch car owners. Their study focused on variations in the differences in the average fuel prices of petrol, diesel and LPG between September 2013 and June 2015.<sup>43</sup> The only statistically significant effect was found for car owners living less than 10 kilometres from the German border:<sup>44</sup> a 1% increase in the fuel price in Germany leads to a 1.1% increase in the chance that they will fuel their cars in the Netherlands. Possible explanations for this generally price-inelastic demand for fuel on the other side of the border are the many savings cards offered by Dutch fuel stations as well as the small number of commuters between the Netherlands and the neighbouring countries, unlike in the Swiss border regions, for example, as explored in Banfi, Filip Pine & Hunt (2005).

An important factor is the public awareness and perception of the price differences. The keeping of prices of all businesses is impracticable, so consumers often have a general perception of the prices at different locations, acquired from own experiences and accounts by others. Baker (2017), Johnson & Kueng (2017), for example, show that consumers react stronger to rate changes that receive more media attention.<sup>45</sup> In the Dutch context, Jansen & Jonker (2016) find similar indications of this in relation to the excise duty increase on fuel in January 2014, which led to much commotion. They find a temporary positive effect on fuel tourism, which wanes in the long term. A second important factor is the substitutability of products, because they are identical, for example, or easy to transport. Agarwal, Chomsisengphet, Qian & Xu (2017) show that residents of Singapore who live near the Malaysian border spend much less in Singapore than their compatriots further away from the

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<sup>41</sup> Whereby the reduction in consumption of Swedish alcohol was approximately equal to the increase in consumption of Danish alcohol.

<sup>42</sup> Banfi, S., Filippini, M. & Hunt, L. C. (2005), Fuel tourism in border regions: The case of Switzerland, *Energy Economics*, 27(5), 689-707; Leal, A., Lopez-Laborda, J. & Rodrigo, F. (2010), Cross-border shopping: a survey, *International Advances in Economic Research*, 16(2), 135-148.

<sup>43</sup> Jansen, D.J. & Jonker, N. (2016), *Fuel tourism in Dutch border regions: are only salient price differentials relevant?*, DNB Working Paper No. 519, Amsterdam.

<sup>44</sup> Although the border effects of fuel tourism are not statistically significant in Jansen & Jonker (2016), either for the border regions with Belgium or for residents who live more than 10 kilometres from the German border, this does not mean that these effects are non-existent. The effects are often smaller as car owners live further away from the border and may not be properly identifiable, i.e. with statistical significance, due to the dataset used, the estimation methodology, the calculation of the average fuel prices of petrol, diesel and LPG, as well as the small number of respondents who fuel their cars.

<sup>45</sup> Baker, S.R. Johnson, S. & Kueng, L. (2017), *Shopping for Lower Sales Tax Rates*.

border.<sup>46</sup> This effect only applies, however, to goods and services that are relatively easy to purchase across borders, such as a supermarket purchases, and not to goods and services that are location bound, such as expenditures on education. The importance of substitutability is expected to be greater for excise goods, such as petrol, cigarettes and liquor, than for other goods. Excise goods are often easy to transport, identical between countries and have longer shelf lives, which usually leads to high price elasticity. As stated before, Jansen & Jonker (2016) could barely find any statistically significant effects of price changes in fuel in the Netherlands, relative to Belgium and Germany.

Baker, Johnson & Kueng (2017) show that a change in the price of a given product not only has an effect on the sales of that product, but also on those of other products in the same shop. Once consumers have incurred costs to engage in cross-border consumption at a certain location, this can also impact goods that show no international price differences, a phenomenon known as the 'bundling' effect. These consumers will use foreign shops to also buy products that are equally priced or perhaps even priced slightly higher than in their own country. Factors like price perception, substitutability and 'bundling' thus form partial explanations for the price elasticity of a specific product in a certain (border) region. At the same time, the combination of the wide variety in price sensitivity of products and the many influencing factors clearly demonstrate that the turnover changes and turnover shifts in specific products, caused by variation in the price differences between neighbouring countries and between international neighbouring regions, are difficult to predict.

Many policy studies that calculate the effects of a VAT change, assume that any increase in the VAT rate, including the corresponding loss of turnover, is fully passed on to consumers through higher selling prices, thus making the producer's loss of turnover entirely dependent on the price elasticity of demand.<sup>47</sup> A price increase by 2.83% due to the VAT increase (see paragraph 2.3) and a price elasticity of demand of -1.0 thus leads to a turnover loss of  $2.83\% * -1.0 = -2.83\%$ . A study by Panteia (2018) employs a similar method to calculate the loss in turnover in border regions.<sup>48</sup> A small additional effect on the loss in turnover is the so-called income effect resulting from the consumer's loss of purchasing power. On average, this study estimates the ensuing revenue losses at about 5% for the three sectors investigated: flowers and plants (-23 million euro), bread, cake and pastry (-38 million euro) and hospitality, especially leisure and the catering sector (-456 million euro). The study does, however, make bold assumptions as to the calculation of what it calls 'border effects'. One important assumption is that of major price elasticities, especially in the border regions,<sup>49</sup> resulting in a relatively high loss in turnover. It is also important to note that border effects should, strictly speaking, only concern the additional effects of a region's situation near the border, such as higher price elasticities compared to the national average. The above study, however, considers the entire loss in turnover in border regions a consequence of border effects, even though most of that turnover loss is nothing else than a negative effect of the VAT increase on a national scale, i.e. non-border regions will largely face the same negative effect on their turnover.

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<sup>46</sup> Agarwal, S., Chomsisengphet, S., Qian, W. & Xu, W. (2017), *Tax Differential and Cross-Border Shopping: Evidence from Singapore*.

<sup>47</sup> Infinite price elasticity of supply is thus implicitly assumed; see further Jongen, E., Lejour, A. & Massenz, G. (2018), Cheaper and More Hair Cuts After VAT Cut? Evidence from the Netherlands. *De Economist*, 166:135-154.

<sup>48</sup> Panteia (2018), *Grenseffecten van de verhoging van het lage BTW-tarief naar 9%*, Zoetermeer.

<sup>49</sup> Amounting to one-and-a-half times the national average of about 1.0 in the medium scenario.

## 4. Exploration of the situation in the border regions

### 4.1 Approach

The empirical studies discussed in Chapter 3 show that the extent to which tax increases and corresponding price increases have border effects depends of the context and may vary considerably between products. In this section, we try to gain more insight into the specific situations in the border regions between the Netherlands and Germany on the one hand, and the Netherlands and Belgium on the other hand. Given the large differences in price elasticity between goods, we focus on everyday shopping activities and supermarket purchases as they form the largest segment of products purchased under the low VAT rate and relatively much information can be found about them.<sup>50</sup> As part of the study, we look at the current price differences between the Netherlands and foreign countries and subsequently use purchase flow studies to estimate the (cross-border) purchase flows. In addition, we look at differences within the Netherlands that can provide an indication of the size of the border effect, i.e. the price differences between various Dutch supermarket chains and regional differences in the number of supermarket branches. This information, along with the previous insights from Chapter 3, gives us some guidance regarding the extent to which consumers are prepared to benefit from price differences in border regions. We first provide some data on VAT revenues in the Dutch border regions, to obtain a picture of how many Dutch consumers may be exposed to border effects.

### 4.2 Basic Information VAT revenue in the border regions

In large parts of the Netherlands the border plays no role in daily life. The Randstad region (an urban area of high population density and economic concentration comprising the four largest Dutch cities), for example, is situated relatively far from the border. The Netherlands is a small country, however, meaning that the border with a neighbouring country is always relatively near. Table 2 presents an overview of the number of residents living within a radius of 10, 20 or 30 kilometres from a national border. For as much as 13% of the Dutch population, the border is only a stone's throw away, i.e. no more than 10 km, while nearly a third of the population lives within 30 kilometres of the border. This group can be considered residents of a border region. The previous section has shown that border effects can be far-reaching, although their impact decreases as the distance to the border grows.

An ideal dataset would not only contain information on the number of residents in the border regions, but also on the amounts of VAT that the state collects from businesses in the border regions. Tax revenues are rarely broken down by region, however, as are VAT revenues.<sup>51</sup> In Table 2 we nevertheless attempt to give an indication of the total VAT revenues in the border regions. To this end, we redistributed both the total revenues from the low VAT rate in 2016 and the expected additional income from the rate increase by numbers of inhabitants. Proportionate redistribution of VAT revenues across the country shows that the revenues from the low VAT rate were almost 1.6 billion in the area within 30 km from the border in 2016. The planned increase in the low VAT rate would raise this amount by over EUR 800 million to EUR 2.4 billion in the wider border region, almost

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<sup>50</sup> Figures from the *Centraal Bureau Levensmiddelenhandel* (CBL - Central Office for Foodstuff Trade, the Dutch branch organization for supermarkets and the food-services industry) show that supermarkets account for 38% of VAT revenues under the low rate, amounting to EUR 1,000,000 on a total of EUR 2,613,000. See CBL news item *Top 10 maatregelen en effecten van het Regeerakkoord* (Top-10 measures and effects of the Coalition Agreement).

<sup>51</sup> A breakdown of VAT revenues by region is not publicly available in any case.

1 billion of which would be generated in the region within 10 km from the border. Although merely a rough indication, it is clear that VAT revenues in border regions are considerable both in relative and absolute terms. Due to the scope of the border effects, a small shift of sales abroad may lead to tens of millions of euros less in tax revenues than budgeted.

Table 2: Number of residents within 10 km, 20 km, 30 km from the national border on 01-01- 2013, and VAT revenues in 2016 and 2019 in millions of euros

Distance to the border	Number of residents	Percentage	Revenue VAT low 2016*	Additional revenue $\Delta$ vat low 2016-19	Total revenue VAT low 2019**
< 10 km	2,177,835	13.0%	633	339	972
10 to 20 km	2,006,805	12.0%	583	313	896
20 to 30 km	1,226,250	7.3%	356	191	547
> 30 km	11,365,740	67.7%	3,303	1,770	5,073
Total	16,776,630	100.0%	4,875	2,613	7,488

Notes:

In Appendix B, the data are further broken down by Dutch border regions with Belgium and Germany respectively.

\* The total VAT revenues for 2016 were EUR 48,557 million (National Accounts 2016, page 25), equalling 29.3% of total tax revenues. The relationship between tax revenues generated through the low and the standard rate was calculated on the basis of the *Sleutel tabel 2018* (a policy document that contains the different tax brackets and rates for each year). The low VAT rate generated an estimated EUR 2,613 million, i.e. 3% of total tax revenues.

\*\* This does not take into account the autonomous development of VAT revenues between 2016 and 2019.

Source: Statistics Netherlands (CBS) (2013). *Bevolking en huishoudens; viercijferige postcode*, 1 januari 2013; CBS (2014), *Afstanden van postcodes (4 cijfers) tot de grensovergang, berekend over de weg*; own calculations, where the distance to the border was calculated by postcode area, i.e. from the centre of the postcode area via the motorway to the nearest national border.

### 4.3 Current price differences

The extent to which spending shifts abroad depends on the change in price. If businesses fully pass on the VAT increase to the customers, retail prices will rise by 3%, i.e.  $(109-106) / 106 * 100\%$ . One way to determine how consumers will respond to such a price increase, is to study the current price differences and cross-border purchase flows. If price differences between the Netherlands and the neighbouring countries are currently large, while cross-border purchase flows nevertheless remain small, this could be a sign that the consumer response to future price changes might be mild as well. The opposite may be expected when consumer expenditures abroad are currently relatively large while price differences are small. Quantifying (international) price differences between supermarkets is a challenge however. The standard method is to determine the average price in each country by using the same 'basket' of goods. Consumers have different preferences, however, and the exact products offered by supermarkets often differ on aspects such as brand, content, quality and design, especially in international comparisons. For this reason, this study uses two data sources, each with its own method to provide indications of the differences between the Netherlands, Belgium, and Germany in price level for everyday supermarket purchases.



Table 3: Difference in price level between and percentage of cheaper products in Belgium, the Netherlands and Germany

Product group	Belgium	Netherlands		Germany	
		Price	Cheaper products	Price	Cheaper products
dry food	Ref.	-16.4%	76.6%	-9.5%	65.8%
sweets and biscuits	Ref.	-14.0%	76.5%	-12.3%	72.8%
perishable food	Ref.	-10.5%	71.7%	-13.0%	74.0%
non-alcoholic beverages	Ref.	-10.4%	70.5%	-9.2%	63.1%

Source: Instituut voor de Nationale Rekeningen (2018), *Jaarverslag 2017; analyse van de prijzen*.

The first data source is the price observatory that is part of the Belgium Institute for the National Accounts (*Instituut voor de Nationale Rekeningen* - abbr. INR). Part of the 2017 annual report, it compares the price levels for foodstuffs and other consumer goods in the Netherlands, Belgium and Germany<sup>52</sup> using the data of research firm Nielsen, which keeps prices for each unique food product. The data covers the period from October 2016 to September 2017, excluding fuel stations and hard discounters such as Lidl and Aldi.<sup>53</sup> It consistently compares Belgium with one of its neighbouring countries, only including unique foodstuffs that are sold in both countries. Table 3 shows that, while clear price differences can be observed between countries, there is also great variation across product groups and specific products.<sup>54</sup> It is clear that the general price level is much higher in Belgium than in Germany and the Netherlands. The price differences between the Netherlands and Germany are less obvious, whereby dry food is cheaper in the Netherlands and perishable foods, such as vegetables and fruit, are cheaper in Germany. On average the Netherlands seems to have a small advantage.

Eurostat, the EU statistics office, is the second source of data on international price differences used in this study. While it collects information about prices of all sorts of goods in all EU countries, it runs into a number of problems that make the reported figures mere indications. Eurostat is using Price Level Indicators (PLI) in an attempt to estimate the differences in price levels between countries. Table 4 stands out, in that the price differences vary strongly across product groups, like in the data from the Belgian price observatory. The general level of food prices is presented in the final category, *total food*.<sup>55</sup> In accordance with the data from the price observatory, a clear difference can be observed between the Netherlands and Belgium, where prices are approximately 12% higher. The Eurostat data in Table 4 are slightly more conclusive than the data in Table 3 as to the difference in price level between the Netherlands and Germany, showing that the Netherlands is cheaper. Food generally seems to be about 6% cheaper in the Netherlands than in Germany, though this price advantage is not observed in each subcategory.

<sup>52</sup> Instituut voor de Nationale Rekeningen (2018), *Jaarverslag 2017; analyse van de prijzen*.

<sup>53</sup> In addition, only shops with a minimum size of 400 m<sup>2</sup> were included, where foodstuffs constituted at least 40% and meats no more than half of the turnover. Small and medium-sized enterprises may be somewhat underrepresented in this price comparison. For more information about the methodology, see: Instituut voor de Nationale Rekeningen (2018), *Jaarverslag 2017; analyse van de prijzen*.

<sup>54</sup> Dry food, for example, is 16.4% cheaper in the Netherlands than in Belgium. Almost a quarter (23.4%) of the specific products in this category is nevertheless lower priced in Belgium than in the Netherlands.

<sup>55</sup> Weighted average of all food product groups (not all of these product groups are shown in the table). A wide range of outlets was monitored, nevertheless, so as to include small and medium-sized enterprises in the price comparison. Also, attempts were made to take into account different prices in different regions outside the central (capital) regions of the countries involved.

Table 4: Comparison of Price Level Indicators (PLI) between the Netherlands and its neighbours (2016)\*

Product group	Belgium	Netherlands	Germany
bread products	111.3	91.6	103.0
meats	122.5	114.1	119.8
milk, cheese and eggs	119.0	95.5	91.9
fruits and vegetables	101.8	107.6	115.0
total food	112.6	100.3	106.2

Note:

\* 100=eu28 average.

Source: Eurostat (2018), *Purchasing power parities (PPPs), price level indices and real expenditures for ESA 2010 aggregates* [prc\_ppp\_ind] [database].

Both methods have the downside of being based on the average prices of product groups in the three neighbouring countries, i.e. the Netherlands, Belgium and Germany. The studies cited in the previous Chapter show, however, that price may be a function of distance to the border, making price differences smaller on the border than closer to the middle of the country. Another disadvantage of the method used is that it does not take into account the influence of factors other than price that determine the choice of the purchasing location and hence also influence the cross-border purchase flows, e.g. the quality of products and services, product range, homeliness, etc.

#### 4.4 Purchase Flow Research

Price differences between the Netherlands, Belgium, and Germany generally seem beneficial to the Netherlands. It is not easy to find out, however, whether this is tempting Belgian and German consumers to do (part of) their spending in the Netherlands as the European internal market allows for goods and services to be purchased abroad and borders to be crossed without registration of personal data. There are thus no figures from official authorities on spending by foreign consumers in the Netherlands. There are data available, however, from purchase flow research. Some of the border regions and two national research institutes have carried out this type of research in recent years, mapping (cross-border) purchase flows, i.e. spending, through surveys. This research has a number of limitations but can nevertheless give an indication of cross-border spending.<sup>56, 57</sup> We will first discuss regional purchase flow research<sup>58</sup>, with ample attention for the study that pays the most attention to cross-border consumption, a study carried out in Limburg in 2009. Subsequently, we will address two national studies on purchase flows.

Together with several partners, the Province of Limburg commissioned a number of studies on the purchase flows between Limburg and the surrounding regions in Belgium, Germany, and the Netherlands. The latest study in this series, *Grenzeloos Winkelen* (Boundless Shopping), was carried

<sup>56</sup> One study, for example, extrapolates the spendings of a (selective) sample to the entire population in the area under observation. Some of the studies also limit themselves to measuring the purchase flows within the area under observation, while ignoring the purchase flows that cross its border.

<sup>57</sup> Purchase flow research is often divided into daily (supermarket) shopping and recreational shopping, although definitions of both categories are lacking. Purchase flow research in Limburg and adjacent areas defines daily shopping as daily purchases typically purchased in a supermarket, for instance food and personal care products. (Recreational) shopping is defined as, for example, the purchase of clothing, books, furniture and other luxury household items.

<sup>58</sup> We confine ourselves to the most recent publicly available purchase flow research.

out in 2009.<sup>59</sup> A large number of the residents of border regions in Germany (78%), Belgium (68%) and the Netherlands (62%) indicated that they occasionally shopped abroad. About 60% of the respondents indicated that price level was an important motivation for cross-border shopping. The Dutch (5%), Belgians (6%) and Germans (7%) thus spend a significant part of their total spending on daily groceries abroad. As a consequence, an annual amount of EUR 228 million leaves Limburg to be spent in German and Belgian border regions, while residents of the Belgian and German border regions spend EUR 473 million per year in Limburg.

There have also been purchase flow studies in other Dutch border regions alongside Limburg. These studies seem to indicate lower volumes of cross-border shopping as well as less interest. A study of the purchase flows between the Arnhem-Nijmegen metropolitan area and its German neighbour, the Kleve region, for instance, shows a lower frequency of cross-border shopping than in Limburg: 1.6% of daily shopping is done across the border in Kleve, while residents of the German region of Kleve do 2.5% of their spending in the Arnhem-Nijmegen area. This makes the flow of money into the Netherlands (EUR 50 million) larger than that into Germany (33 million euro).<sup>60</sup> Cross-border spending plays an even smaller role in the province of Drenthe. The abovementioned study does not present any data on German spending in Drenthe, but only 1% of daily spending in the Drenthe region goes abroad.<sup>61</sup> Foreign border residents do seem to visit the Netherlands more often than vice versa, although the difference is relatively limited. Germans, for example, spend an annual EUR 87 million on daily groceries in the Eastern Netherlands, compared to only 42 million the other way around.<sup>62</sup>

Alongside this regional purchase flow study, a number of national studies have been conducted of household spending on daily groceries. Studies by Deloitte in 2014 and 2015 show that one quarter of Dutch households occasionally shop for groceries outside the Netherlands.<sup>63</sup> On average, these households spend well over 50 euros per month on groceries abroad. In addition, two-thirds indicate that they combine shopping with other activities. GfK conducted similar studies over the past few years.<sup>64</sup> In 2016 they found that almost 4 in 10 households in regions bordering Germany had shopped in a German supermarket in the previous year and that 4.07% of spending on daily groceries in these regions went to Germany. Nationwide, the percentage spent on daily groceries across the border had increased to 2.70% in recent years. In absolute terms, this represents an annual turnover of nearly EUR 1 billion.<sup>65</sup>

The amounts referred to in the purchase flow studies are often rough indications. They do, however, present a relatively consistent image: the share of cross-border daily grocery shopping remains limited in all studies. Nevertheless, market shares of a few percent of total spending are no small change. The Dutch, for example, spend around EUR 1 billion on daily groceries abroad. In addition, almost all purchase flow studies point out that Belgians and Germans probably spend even more in the

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<sup>59</sup> See BRO (2009), *Grenzeloos winkelen*.

<sup>60</sup> I & O research and Ecorys (2016), *kopen@regio Arnhem-Nijmegen: Koopstromenonderzoek regio Arnhem-Nijmegen*, 2016.

<sup>61</sup> I & O research (2015), *Kopen in Drenthe*.

<sup>62</sup> I & O research (2015), *Kijken, kijken naar kopen: Koopstromenonderzoek Oost-Nederland 2015*.

<sup>63</sup> Deloitte (2014), *Consumentenonderzoek 2014* en Deloitte (2015), *Consumentenonderzoek 2015*.

<sup>64</sup> GfK (2017), *Supermarktinzet stijgt met 4,4% in april*.

<sup>65</sup> Estimated by calculating 2.7% of the annual turnover of Dutch supermarkets in 2017, which is 35.58 billion according to GfK (2018), *Omzetgroei van 3,2% voor supermarkten in 2017*.

Netherlands. This net difference in purchase flows creates substantial benefits for Dutch businesses and the Dutch economy. However, the (relative) size of foreign spending differs per region. In Limburg, for example, cross-border shopping is a greater part of spending than in the other border regions for which information is available. It cannot be said with certainty whether price differences drive these cross-border purchase flows from Belgium and Germany to the Netherlands, although the image that arises from this study seems to support this line of reasoning.

#### **4.5 Price level and border effects of Dutch supermarkets**

The previous sections investigated the extent to which consumers exploit price differences between the Netherlands and neighbouring countries. This investigation is based on (average) national price levels. However, price differences for foodstuffs may also occur within countries. The large price differences between domestic supermarkets, whereby the more expensive supermarkets remain competitive and profitable despite their higher prices, imply that consumer purchasing behaviour is not only driven by price differences. The same would then apply to the price differences between domestic and foreign supermarkets. Supermarket chains in the Netherlands tend to adhere to a national pricing policy, so that price-level differences typically occur between supermarket chains. The various price levels are generally known to the public and are regularly measured by a number of organizations. At the end of 2017, for example, the Dutch consumers' association (*Consumentenbond*) measured the prices of 150 premium brands and 120 own brands of the largest supermarkets in the Netherlands. Table 5 shows clear price differences per supermarket chain. What is noteworthy is that more expensive chains are not necessarily less successful. Market leader and 'full-service supermarket' *Albert Heijn*, for example, has a relatively high price level, with own-brand prices an average 23% higher than those of discounters Aldi and Lidl. A price increase of 3% due to an increase in the low VAT rate is thus small compared to the size of the price differences between Dutch supermarket chains.

Table 5: Price differences between Dutch supermarket chains

	Own brands	Premium brands
Aldi	85	*
Lidl	85	*
Dirk	90	95
Vomar	91	95
Hoogvliet**	93	95
Deka	97	99
Jumbo**	98	97
Picnic	98	94
Deen	99	99
Plus	104	102
Emte	106	102
Jan Linders	106	100
Albert Heijn	108	102
Coop	108	102
Poiesz	112	103
Spar	120	112

Notes:

100=average price level; \*=not available; \*\*=unweighted average of different types of branches

Source: Consumentenbond (2018), *De ene Jumbo is goedkoper dan de andere; maar even omrijden?*.

In addition, the study conducted by the *Consumentenbond* (a well-known Dutch consumers' association) addressed a relatively unknown phenomenon in the Dutch supermarket sector in showing that supermarket chains *Jumbo*, *Hoogvliet*, and *Plus* divide their branches into two or three different price brackets. Table 6 shows that the prices between branches may vary by several percentage points internally for each chain. These stores, which have an identical product range, are sometimes less than 10 kilometres apart. The existence and survival of (almost) identical branches within such a short distance begs the conclusion that consumers are not exploiting price differences of a few percentage points, not even within their own country.

The existence of these different price brackets within the same chains can also teach us more about the price levels between the Netherlands and other countries in another way. In response to the research of the *Consumentenbond* consumers' association, *Jumbo* stated that it classifies its branches in particular price brackets based on the level of competition nearby.<sup>66</sup> Table 6 shows that this differentiation in price brackets concerns the premium brands, which are more expensive than own brands. *Jumbo* would set lower price levels in the border regions if branches there faced above-average competition from foreign chains.<sup>67</sup> Conversely, the level of competition may also be perceived as lower since consumers are less inclined to travel a certain distance if it involves crossing a national border. This may be due to border barriers regarding language and culture or lack of information about the retail mix, prices and the product range on the other side of the border. Less competition may also

<sup>66</sup> 1Limburg (2018), *Klant Jumbo in Limburg meestal duurder uit*.

<sup>67</sup> The two other chains that use different price brackets in their branches do not have nationwide retail networks or are setting different price rates in too small a number of branches to allow for analyses.

be perceived due to the prices outside the Netherlands, which are generally somewhat higher, especially in Belgium, as shown in Tables 3 and 4 in this section.

Table 6: Price brackets in different *Hoogvliet* and *Jumbo* branches.

	Own brands	A-brands
Hoogvliet Low	90	*
Hoogvliet High	95	*
Jumbo Low	*	95
Jumbo Medium	*	96
Jumbo High	*	99

Notes:

100=average price level; \*=no difference in price

Source: Consumentenbond (2018), *De ene Jumbo is goedkoper dan de andere; maar even omrijden?*

Table 7 shows the extent to which *distance from the border* influences the likelihood of having low price levels. It shows that *Jumbo* supermarkets in areas within 10 km from the Belgian or German border are in higher price brackets more often, compared to the national average: 88.5% and 86.8% of the branches respectively, compared to 64.0% nationwide. The other figures on branches within 30 km from the border also show that prices are generally higher in branches in border regions than in branches located further away from the border. This is especially the case at the border with Germany. This means that the *Jumbo* supermarkets in the border regions are not experiencing (extra) competition from foreign supermarket branches but are rather adapting to the higher price levels on the other side of the border and the existing border barriers to exploit any price advantages.

Table 7: Price brackets of premium brands in *Jumbo* branches in and outside the border region

	<= 10km from Belgium	<= 30km from Belgium	<=10km from Germany	<= 30 km from Germany	Total NL
High price range	88.5% (23)	79.0% (64)	86.8% (33)	86.5% (83)	64.0% (240)
Low or average price range	11.5% (3)	21.0% (17)	13.2% (5)	13.5% (13)	36.0% (135)
Total	100% (26)	100% (81)	100% (38)	100% (96)	100% (375)

Notes:

Since *Jumbo* generally sets one price level for all its branches in one town, the analysis uses 'town' as a research unit. These categories have been joined in the analysis due to the small number of towns/branches with low and average price ranges. Further analyses using a logistical regression model support the conclusion that *Jumbo* tends to classify its branches in the border regions in a higher price bracket (see Appendix C).

Source: Consumentenbond (2018), *Overzicht van de prijsniveaus van Jumbo en Hoogvliet supermarkten in Nederland*; CBS (2014), *Afstanden van postcodes (4 cijfers) tot de grensovergang, berekend over de weg*; own calculations.

The fact that *Jumbo* often puts premium brands into higher price brackets in its border-region branches does not mean that supermarket customers in the border regions are not price sensitive. To gain more insight in this phenomenon, we examined the size of the effect of a price increase in the Netherlands on the cross-border purchase flows of very price-conscious supermarket shoppers. If shifts in purchase flows following the 3%-point increase of the low VAT rate are to be expected anywhere, it is among the customers of discounters like Aldi and Lidl. Supermarket chain Aldi provided

us with additional information on the purchasing behaviour of its customers in the border regions in Limburg.<sup>68</sup> Aldi estimates that 20 to 40% of its clientele in branches near the German border comes from Germany. In addition to price differences, other determining factors for cross-border shopping are Sunday openings and the great appeal of Designer Outlet Roermond. Aldi branches in the Netherlands benefit from the fact that German customers are familiar with the Aldi chain and Aldi product range due to its German origins. In addition, these customers are highly price sensitive compared to other supermarket customers. It is also important to note that Dutch customers visit Germany too to buy certain products, i.e. the purchase flows are bi-directional. The purchase flow from Germany to the Netherlands is considerably larger, however, than the other way around.

Near the Belgian border, supermarket visits of Belgian customers to Dutch Aldi branches are much rarer: no more than 20% of the customers come from Belgium. Residents of Belgium shop in the Netherlands less often than their German counterparts, even though the price differences between Belgium and the Netherlands are larger than those between Germany and the Netherlands. This has several reasons: the river Meuse constitutes an additional geographical barrier and Belgian customers are less price sensitive. Also, Belgian customers are more attached to premium brands and are less familiar with the Aldi range than their German counterparts. A price increase of nearly 3% due to the increase of the low VAT rate is likely to have little effect on the purchase flows among Belgian and Dutch customers in the border region of Belgium and the Netherlands. The border region of Germany may see some shifts in supermarket purchases that benefit the German Aldi branches.

## 5. Conclusions

### 5.1 Motivation and research question

The Dutch government intends to increase the low VAT rate from 6 to 9% as of 1 January 2019. This constitutes a tax increase of 3 percent point on goods and services such as foodstuffs, medicines and hairdressing services, aimed at generating EUR 2.6 billion annually. This study is an attempt to explore the potential impact of the increase in the low VAT rate on the border regions. To this end, we first outlined the basic information about VAT, such as the classification of goods and services into different VAT-rate brackets and the creation of the proposal to increase the low VAT rate. Subsequently, we tried to estimate the potential border effects of the VAT increase on consumer prices using an inventory of international academic research on the differences in turnover tax between countries. These academic insights were then complemented by concrete indicators of current (and potential) cross-border spending in the border regions, such as the number of residents and the international purchase flows in these regions, as well as the price differences within the Netherlands and between the Netherlands and its neighbours.

The central research question of this study concerns the scope and size of the border effects of this measure on consumers, businesses and the state. To this end, we addressed the following sub-questions:

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<sup>68</sup> Thanks to Aldi Netherlands for providing this information.

1. How many consumers in the border regions are potentially affected by the VAT increase, what is the impact, in the border regions, on competitiveness; employment and profit margins in businesses; and on the tax revenues of the state?
2. To what extent will a VAT increase lead to price hikes for consumers, and will these hikes be higher or lower than the Dutch average in border regions?
3. What is the potential impact of a price increase on turnover and purchase flows between the Netherlands, Belgium and Germany, as well as on profit margins and employment in businesses?

## 5.2 Assessment of the border effects

The above subquestions will be addressed in succession below.

### *Re 1*

Approximately one-third of the inhabitants of the Netherlands live within 30 kilometers from a border, a reasonable distance to define as a border region. This sufficiently clarifies the scope of any border effects, which is particularly extensive in a province like Limburg, large parts of which have two borders within 30 kilometres. In addition, VAT revenues in border regions appear to be substantial, both in a relative and absolute sense. Proportionate distribution of the VAT revenues according to population size shows that border-region revenues from the low VAT rate totalled EUR 1.6 billion in 2016. The planned increase in the low VAT rate would raise this amount by over EUR 800 million to EUR 2.4 billion, almost 1 billion of which would be generated in the region within 10 km from the border. Although merely a rough indication, it is clear that VAT revenues in border regions are considerable in relative terms, i.e. as a proportion of the national revenues, as well as absolute terms, i.e. in billions of euros. Due to the scope of the border effects, a small shift of sales abroad may lead to tens of millions of euros less in tax revenues than budgeted.

The VAT increase raises the Dutch low VAT rate above the lowest rate in Belgium (6%) and the low rate in Germany (7%). The low VAT rate in the Netherlands applies to goods and services that are considered basic necessities of life. In principle, the VAT increase turns a potential competitive advantage of Dutch businesses in the border region into a potential competitive disadvantage. Compared to the neighbouring countries, however, relatively many goods and services fall under the low VAT rate in the Netherlands. In addition, there are many other factors that determine the competitive position of businesses. If the increase in the low VAT rate is fully passed on to consumers, this will lead to a price increase of nearly 3% ( $2.83\% = (109-106) / 106 * 100\%$ ). This may result in revenue losses and, consequently, job losses. The extent to which revenue losses will occur depends on the price elasticity of demand, among other things, which can be greater in border regions than in the rest of the country. The previously mentioned study by Panteia (2018)<sup>69</sup> makes various assumptions to calculate the border region's loss in turnover of approx. 5% (EUR 563 million) in the segments of flowers and plants; bread; cakes and pastries; and hospitality, including leisure and catering, and entirely designates it as a border effect. Overall, however, the (additional) cross-border effect equals only one-third of this loss in turnover.<sup>70</sup> This nevertheless amounts to approximately EUR 188 million in additional turnover loss due to border effects, incurred in these segments in the border

<sup>69</sup> Panteia (2018), *Grenseffecten van de verhoging van het lage BTW-tarief naar 9%*, Zoetermeer.

<sup>70</sup> Amounting to about 1.7%. The bulk of the loss in turnover is a national effect of the VAT increase, i.e. no different from that in non-border regions.



regions. The total turnover loss of EUR 563 million in the three segments in the border regions can, however, be offset against the more than EUR 800 million increase in VAT revenues collected by the Dutch state in the border regions (compared to EUR 2,613 million in extra VAT revenues for the whole of the Netherlands). The less businesses are inclined to pass on the price increase, the lower their direct losses of turnover and jobs will be. Employment may still be lost in the long term, however, as profit margins will be affected. The Netherlands Bureau for Economic Policy Analysis (CPB) assumes that consumers will pay 75 percent of the tax increase and businesses 25 percent.

#### *Re 2*

It depends on many different factors to what extent businesses will pass on the increase of the low VAT rate to consumers. In principle, this depends on the price elasticity of demand, i.e. the extent to which consumers respond to price increases by buying less of the product or service. Businesses will be reluctant to increase prices if consumers are sensitive to price changes. In this event, an increase in the low VAT rate will come at the expense of corporate profit margins. However, the price elasticity of demand for products and services varies quite substantially. Previous studies have shown that almost nothing was passed on to the customer in some cases, while the entire rate increase and more was passed on in other cases. In addition, the degree of competition and competitor activities play an important role. In its assessment of the tax revenues resulting from the VAT increase, the Netherlands Bureau for Economic Policy Analysis (CPB) assumes that enterprises will be passing on 75% of the rate increase by 3 percentage points to the consumer. This equals an average price rise of more than 2% for consumers ( $2.12\% = 75\% * 2.83\%$ ).<sup>71</sup>

Differences may occur in the extent to which businesses located at the border and their counterparts in more central regions will be implementing the price increase, depending on the level of competition in the region. It is clear that prices for many products are considerably lower in the Netherlands than in Belgium and generally somewhat lower than in Germany. The current price differences with Belgium and Germany, respectively, amount to about 12% and 6% in favour of the Netherlands. These figures include price comparisons of small and medium-sized enterprises. For some products in particular, the price differences are smaller or even in favour of Germany. An increase of the selling price by about 3% will barely affect the price advantage enjoyed over Belgium, but may do so in the case of Germany. This means that the differences with Belgium will generally remain large, even after a price increase due to an increased low VAT rate. The price balance with Germany may tilt, however, as price differences are smaller and prices are already lower for a number of products in Germany. It is also important to note that the price differences between the most expensive and cheapest supermarket chains within the Netherlands are many times greater than those caused by a potential price increase due to an increase in the low VAT rate.

On the one hand, mitigated price increases may be expected at the border compared to central regions because there are no price increases on the other side of the border. Previous studies have found such effects. This would then lead to mitigated turnover losses for businesses in border regions compared to businesses in the rest of the country. The border effect may have a very strong mitigating impact on price increases in border regions, which may even extend far inland according to previous

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<sup>71</sup> The above study by Panteia (2018) does not take this into account.

studies. Although the size of border effects tends to decrease rapidly with distance to the border, they may even affect almost the entire country.

On the other hand, our analysis of a specific supermarket chain shows that prices in border regions may also exceed those in central regions. A possible reason for this phenomenon is that there is less competition in border regions; firstly because people generally are less inclined to cross a border for their purchases than to go shopping in neighbouring towns in their own country. A second reason is that prices are generally lower in the Netherlands than in Belgium and, to a lesser extent, Germany. Due to their situation near the border, businesses in border regions are thus less affected by domestic competition and might also be able to adapt, to a certain extent, to the (slightly) higher prices on the other side of the border, allowing them to charge higher prices than the Dutch average. In this event, it would also be easier for businesses in border regions to pass on an increase in the low VAT to consumers than it would be in more central regions.

### *Re 3*

In all studies, the proportion of cross-border daily shopping is relatively limited, yet in absolute sense this amounts to EUR 1 billion that Dutch residents spend abroad on daily groceries. In addition, virtually all purchase flow studies indicate that the expenditures by Belgians and Germans in the Netherlands are even higher. This net difference in purchase flows provides significant benefits for Dutch entrepreneurs and the Dutch economy. The (relative) size of foreign spending differs per region however. In Limburg, for example, cross-border shopping is a greater part of spending than in the other border regions on which information is available. It cannot be said with absolute certainty whether these cross-border purchase flows from Belgium and Germany to the Netherlands originate in price differences, although the image that arises from studies does seem to support this link.

This exploration shows that Dutch consumers and producers in the border regions currently also benefit from border effects. Purchase flows into the Netherlands are larger than those outbound and lead to additional sales in the regions near the German border and in tourist areas. Purchase flows into Limburg are particularly large. Although the size of Dutch spending in foreign border regions is currently limited, the size of the population shows potential for a shift in purchase flows abroad, particularly in light of the insight gained from previous studies that border effects can have a large scope that extends far beyond the immediate border region. Consumers in border regions have alternative options across the border that other Dutch consumers do not have, and foreign consumers may start purchasing less in the Dutch regions. These adverse effects may thus particularly affect businesses in the border regions, manifesting themselves in turnover and job losses, as well as the Dutch state, which may be deprived of part of the tax revenues from VAT due to the displacement of consumption. There may also be negative effects on employment as the profit margins of businesses in the border regions may come under pressure.

Our conclusion, however, points towards a rather small impact of price changes on the cross-border spending behaviour of consumers, given the existing price differences on both sides of the border and the often large price differences within the Netherlands between, for example, various supermarket chains. If there is any impact to be expected anywhere, it is clearly Limburg, especially on the border with Germany, that will be the most severely affected, because the cross-border purchase flows are largest there due to its geographical location. Border effects are usually much larger in the border

regions than further inland. It cannot be ruled out that, very locally along the border, especially the border with Germany, there will be small and medium-sized businesses, such as supermarkets, drugstores, bakers, butchers, and greengrocers, who will be deeply affected by the VAT increase, suffering loss of turnover if they raise their prices or loss of profit or income if they do not.

There are indications that cross-border consumers are paying more than the Dutch average since the price level may adapt to the higher price levels in Belgium and, to a lesser extent, Germany. This effect may be stronger for premium-brand products, which have lower price elasticity, than for own brands and products at discounters like Aldi and Lidl. Belgian customers seem to be less price sensitive, and price differences with Belgium are already the largest, making the purchase flows to and from Belgium less likely to change than those to and from Germany. Another reason for this is that the purchase flows between the Netherlands and Germany seem to be more bi-directional than those between the Netherlands and Belgium.

The literature shows great variation in the extent to which businesses pass the price differences on to consumers: this is very product, service and border-region dependent. In addition, businesses seem more inclined to pass on price increases due to a higher VAT rate or increased purchase prices than price reductions. A tentative conclusion might be that border-region consumers, rather than producers, will probably be paying the largest part of the VAT increase. This may result in loss of turnover and loss of employment. There are studies, however, that show few changes in prices and turnover under similar conditions. It is furthermore highly uncertain to what extent the price increases and turnover losses in the border regions will differ from those in the more central regions. The study by Panteia (2018) assumes that the border effects of price increases will lead to a relatively greater loss in turnover in the border regions (approximately 5%) than in the rest of the country (approx. 3.3%) due to shifting purchase flows between border regions. However, there have been studies that could barely identify any border effects, not even for 'fuel tourism' from the Netherlands. Our assessment is that businesses on the border with Germany will generally be more reluctant to raise their prices than businesses on the border with Belgium.

### **5.3 Recommendations and follow-up**

This exploration shows that it is difficult to produce a proper estimate of the border effects that will occur. The size of the border effects on consumers mainly depends on the decisions of businesses in the border regions whether or not to pass on the VAT increase through pricing and the willingness of both Dutch and foreign consumers to engage in cross-border spending in response to price differences. The academic literature provides a number of indications that warrant the expectation that the planned VAT increase will at least have some impact on cross-border purchase flows. It becomes immediately apparent, however, that it is cumbersome to make a more accurate assessment of these effects.

It is important that the European Union issues regulations that affect both the current temporary system and the future turnover tax system. Steps are currently being taken towards a system of taxation in the country of sale instead of the country of purchase, whereby a supplier will have to charge VAT at the VAT rate applicable in the Member State where the goods are to be delivered. A Dutch company that exports to Germany, for example, will thus have to invoice German VAT rates to

its customer in Germany. From a tax perspective, this will decrease the importance of harmonized VAT rates in the future, and the introduction of the new VAT rules, scheduled for 2022, will give national governments more opportunities to set their own rates, meaning that differences in rates will probably increase. The Dutch policy is to levy taxes that disrupt the economy as little as possible. This has led to a rate policy primarily aimed at making a shift from direct taxation of wages to indirect taxation of consumption, and, secondly, at closing the gap between the low VAT rate and the standard rate. The existing market disturbance caused by different VAT rates in border regions is very likely to increase through the flexibilisation of rates under the New European VAT regime. The European Commission has indicated, however, that this disturbance will have low priority as its size will be negligible compared to total VAT revenues.

A number of recommendations follow from the above:

- First, it would be good to know *the tax policies pursued in the surrounding states* to be able to anticipate a potential future increase in border effects as a result of divergence. If desirable, the scope can be broadened to include the relationship between the policies pursued and European harmonisation and integration.
- Secondly, border regions (or border provinces) are recommended to keep track of the price developments in their areas, in collaboration with Statistics Netherlands (CBS) and the Belgian and German data-collection agencies if necessary. *Baseline and repeat measurements of prices in the Dutch border regions*, preferably including products and services that are subject to the VAT increase as well as products and services that are not, could reveal whether the price increases following an increase in the low VAT rate are higher or lower in the border regions. The same could be done for the turnover of products and services that fall under the VAT increase compared to (related) products and services that do not. This will make it easier to determine afterwards whether consumers and businesses in the border regions are paying more or less for the tax increase than the national average.
- Thirdly, the border regions or border provinces should be aware of the cross-border purchase flows to be able to measure the impact of price increases in the Netherlands as a result of the tax increase. This means that a *baseline measurement of the purchase flows in border regions* must be performed first, followed by several repeat measurements. Such an analysis should involve more than just the size of the purchase flows, also including the motives for cross-border shopping for various products and possibly services, the backgrounds and the preferences of consumers engaging in such activities, and the possible limiting and appealing factors in doing so.
- Fourthly, the performance of *an input-output analysis in a regional macro-economic model* would allow for making a better estimate of the (future) effects of the VAT increase on economic growth and employment in the border regions, especially in combination with the three abovementioned points.

There is already a lot of expertise within ITEM and elsewhere within the University of Maastricht to implement the above recommendations. In addition, and relating to the final point, the existing network at Statistics Netherlands (CBS) and the University of Hasselt can be used to obtain easier access to expertise as well as a number of databases in order to perform calculations with a suitable regional macro-economic model.

## Appendix A: Classification of goods and services according to different turnover tax rates in the Netherlands, Belgium, and Germany

Category	Belgium	Germany	Netherlands
foodstuffs	6%, 12% or 21%	7% or 19%**	6% or 21%**
water	6%	7%	6%
medicines	6% or 21%**	19%	6% or 21%**
medical devices	6% or 21%**	7% or 19%**	6% or 21%**
children's car seats	21%	19%	21%
passenger transport	0% or 6%**	7% or 19%**	6%, 21% or exempt
books	6%, 21% or exempt	7% or 19%**	6%
books on other data carriers	21%	7% or 19%**	6%
newspapers	0%, 6% or 21%	7% or 19%**	6%
magazines	0%, 6% or 21%	7% or 19%**	6%
access to cultural events (shows, theatres)	6% or exempt	7% or exempt	6%
access to amusement parks	6%	19%	6%
cable TV	21%	19%	21%
TV license	-	-	exempt
writers, composers	6%, 21% or exempt	7%	6% or exempt
social housing	6% or 12%**	19%	21%
renovation of private homes	6% or 21%**	19%	6% and 21%**
cleaning in private households	21%	19%	6% and 21%**
agricultural amenities	6%, 12% or 21%	7%	unknown
hotels	6%	7% or 19%**	6%
restaurants and catering	12% or 21%**	19%	6%
access to sports events	6% or exempt	7% or 19%**	6%
use of sports facilities	6%, 21% or exempt	19% or exempt	6% or exempt
social services*	6% or 21%**	7%	21% or exempt
amenities for undertakers	6% or 21%**	19%	exempt
medical and dental care**	21% or exempt	7% or exempt	21% or exempt
refuse collection services ***	21%	19%	21%
small repairs to bicycles	6%	19%	6%
small repairs to shoes and leather products	6%	19%	6%
small repairs to clothing	6%	19%	6%
home care	21%	19% or exempt	exempt
hairdressing services	21%	19%	6%

### Notes:

\*"In so far as those transactions are not exempt pursuant to Articles 132, 135, 136 of the Directive 2006/112/EC".

\*\* "In so far as those services are not exempt pursuant to points (b) to (e) of Articles 132(1) of the Directive 2006/112/EC".

\*\*\* "Other than the supply of such services by bodies referred to in Article 12 of the Directive 2006/112/EC".

Source: European Commission (2018), *VAT rates applied in the Member States of the European Union*.

## Appendix B: Basic information on VAT revenues in border regions with Belgium and Germany

### Data on the regions bordering Belgium

Distance to the border	Number of residents	Percentage	Revenue VAT low 2016*	Additional revenue VAT low 2019+	Total revenue VAT low 2019+**
< 10 km	846,635	5.0%	246	132	378
10 to 20 km	1,278,655	7.6%	372	199	571
20 to 30 km	715,135	4.3%	208	111	319
> 30 km	13,936,205	83.1%	4,050	2,171	6,220
Total	16,776,630	100.0%	4,875	2,613	7,488

### Data on the regions bordering Germany

Distance to the border	Number of residents	Percentage	Revenue VAT low 2016*	Additional revenue VAT low 2019+	Total revenue VAT low 2019+**
< 10 km	1,423,130	8.5%	414	222	635
10 to 20 km	1,222,185	7.3%	355	190	546
20 to 30 km	797,735	4.8%	232	124	356
> 30 km	13,333,580	79.5%	3,875	2,077	5,951
Total	16,776,630	100.0%	4,875	2,613	7,488

#### Notes:

\* The total VAT revenues for 2016 were EUR 48,557 million (National Accounts 2016, page 25). The relationship between tax revenues generated through the low and the standard rate was calculated on the basis of the *Sleutel tabel 2018*, a policy document that contains the different Dutch tax brackets and rates for each year.

\*\* This does not take into account the autonomous development of VAT revenues between 2016 and 2019.

Source: CBS (2013). *Bevolking en huishoudens; viercijferige postcode*, 1 januari 2013; CBS (2014), *Afstanden van postcodes (4 cijfers) tot de grensovergang, berekend over de weg*; own calculations, where the distance to the border was calculated by postcode area, i.e. from the centre of the postcode area via the motorway to the nearest national border.

## Appendix C: Further analysis of price brackets in Jumbo branches

Logistic regression analysis with *Jumbo* branches being in high versus low/medium price brackets as dependent variable

Explanatory variable	Effect	SE
Constant	0.060	0.134
Distance to Belgian/German border >30km	Ref.	Ref.
Distance to Belgian border >20km & <=30km	1.276*	0.573
Distance to Belgian border >10km & <=20km	0.462	0.414
Distance to Belgian border <=10km	1.606*	0.638
Distance to German border >20km & <=30km	1.154*	0.499
Distance to German border >10km & <=20km	2.102***	0.621
Distance to German border <=10km	1.642***	0.524

Notes:

Towns were the research units used in the analyses as *Jumbo* generally sets one price level for all its branches in one town. Due to the small number of towns/branches with low and average price brackets, these categories have been joined in the analysis, whereby 1=high price bracket. Robustness analyses with an ordinal logistical model, with control variables for the number of *Jumbo*'s per town or with a dummy variable for 'town in Limburg', do not yield significantly different results.

Source: Consumentenbond (2018), *Overzicht van de prijsniveaus van Jumbo en Hoogvliet supermarkten in Nederland*; CBS (2014), *Afstanden van postcodes (4 cijfers) tot de grensovergang, berekend over de weg*; own calculations, whereby \*=p<0,1; \*\*=p<0,01 \*\*\*=p<0,001.

## Appendix D: Quick scan of border effects – Increase in the low VAT rate in the Netherlands

Portfolio	Date
Coalition Agreement: VAT Increase	12 October 2017

### Key data

Coalition agreement	Vertrouwen in de Toekomst (Faith in the Future)
Presentation of Coalition Agreement	Tuesday 10 October 2017
Government term	2017 – 2021
Name of government	Rutte III
Coalition parties	VVD, CDA, D66 and ChristenUnie

The coalition agreement contains a wide range of measures. The increase of the low VAT rate from 6% to 9% was chosen as the subject of this ITEM Quick Scan.

### Selection of documents

- [Coalition agreement](#)
- [Final report by \*informatieur\* Zalm](#)
- [Netherlands Bureau for Economic Policy Analysis \(CPB\) - Analysis of the economic and budgetary effects of the coalition agreement](#)



## Brief explanatory note

The VAT is an indirect tax regulated by law in the [Wet op de omzetbelasting 1968 \(1968 Turnover Tax Act\)](#). Article 9 of this Act requires that a distinction be made between three rates:

1. **The high rate => 21% (since 1 October 2012; 19% earlier)**
2. **The low rate => 6%**
3. **The nil rate => 0%**

The low rate of 6% will be increased to 9% in accordance with the Coalition Agreement. This means that daily groceries; medicines; books; (medical) aids; entry tickets to zoos, amusement parks, cinemas, and museums; art objects; hairdressing services; and bicycle repair services, among other things, will become more expensive. The entire list of affected products and services can be consulted via [List I](#), annexed to the 1968 Turnover Tax Act.

## Selection of news articles

- [Accountant - Belastingmaatregelen in regeerakkoord \(10/10/2017\)](#)
- [SConline - Regeerakkoord: Het venijn zit in de staart \(10/10/2017\)](#)
- [Taxence - Fiscale plannen regeerakkoord \(10/10/2017\)](#)
- [Taxlive - Regeerakkoord: Het venijn zit in de staart \(10/10/2017\)](#)
- [Provincie Limburg - Regeerakkoord: Limburg ziet kansen voor samenwerking \(10/10/2017\)](#)
- [1limburg - Limburgse Kamerleden blij met regeerakkoord: 'Veel Limburg' \(10/10/2017\)](#)
- [1limburg - Nieuwe kabinet: Werken over grens moet makkelijker \(10/10/2017\)](#)
- [1limburg - Regeerakkoord: Verbod op criminele motorbendes \(10/10/2017\)](#)
- [1limburg - 'Limburg eindelijk erkend als grensregio' \(10/10/2017\)](#)
- [1limburg - Gouverneur ziet kansen voor Limburg in regeerakkoord \(10/10/2017\)](#)

## Border effects

The national legislation discussed in this dossier will have several border effects, a selection of which is listed below:

- An increase in the low VAT rate will hamper the economic growth of the border regions.
- It will lead to a poorer business climate for enterprises in the Dutch border region, including Limburg.
- It will increase competition between Dutch businesses and their Belgian and German counterparts.
- More people will cross the border into Belgium and/or Germany more often.
- Belgians and Germans will cross the border into the Netherlands less often.

These border effects are further detailed in the ITEM Quick Scan.

**Note:** This dossier is part of the ITEM Quick Scan.

## Notes

## Rating of border effects

In the table below, please indicate the importance of the issue addressed in the left column by ticking the box to the right on the same line that best represents your opinion.

Question	Brief explanatory note	Degree of importance			
		Relevant	Neutral	Irrelevant	n/a
<b>In general</b>					
Micro vs macro level: To what extent does the dossier impact a small or large group of citizens, businesses, etc. in Limburg?	The dossier affects a large group of citizens and businesses in Limburg to a large extent as there are a lot of cross-border consumers in Limburg.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Geography: To what extent does the dossier impact border regions in Limburg?	The dossier has a substantial impact on the border regions in Limburg because there is a lot of cross-border employment in Limburg, and both these cross-border employees and other consumers engage in cross-border shopping.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

European Integration					
To what extent does the dossier impact the free movement of persons, goods, services and/or capital?	The dossier has a large impact on (mainly) the free movement of capital, because more Dutch residents are expected to cross the border for some quick shopping, for example. At the same time, it will become more expensive for foreigners to do some quick shopping in the Netherlands.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
To what extent does the dossier impact European Citizenship?	In principle, the dossier has no impact on European Citizenship.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
To what extent does the dossier impact the good relations between the province of Limburg and its neighbours across the border?	In principle, the dossier does not impact the good relations between the province of Limburg and its neighbours across the border.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Cross-border regional competitiveness					
To what extent does the dossier impact the socio-economic situation in the border region in terms of unemployment, economic growth, and the environment?	The dossier has a large impact on the socio-economic situation in the border regions, because the dossier will, on the one hand, lead to contracted economic growth as people will, for example, be less inclined to cross the border for some quick shopping. On the other hand, the dossier may cause more pollution of the environment since people will be forced to travel longer distances by car. In addition, the loss in income may force employers to dismiss employees.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
To what extent does the dossier impact cross-border employment or cross-border mobility?	If fewer people cross the border to go shopping, for example, shopkeepers will lose turnover or profit. This often leads to cuts in the workforce.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
To what extent does the dossier impact cross-border entrepreneurship?	Foreign entrepreneurs will be less inclined to start a business on the other side of the border if the number of foreign customers is expected to drop.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

To what extent does the dossier impact Euregional educational activities?	In principle, the dossier has no impact on Euregional educational activities.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
To what extent does the dossier impact the coordination of social, environmental and health policies in the border region?	See also the previous questions. There is a chain of consequences.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
To what extent does the dossier impact the business climate?	See also the previous questions. There is a chain of consequences.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Impact on cross-border cooperation and Euregional cohesion</b>					
To what extent does the dossier impact the collaborations between governments, Euregional institutions, businesses, associations, citizens, etc.?	The dossier impacts the collaborations between governments, Euregional institutions, businesses, associations, citizens, etc., in that it would force primarily the authorities in the various countries, at least the public institutions, to collaborate more closely in preventing competition, among other subjects.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

## 3.2 The Qualifying Foreign Taxpayer Obligation (“90% rule”): A Preliminary Ex-Post Impact Assessment

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# The Qualifying Foreign Taxpayer Obligation (“90% rule”): A Preliminary Ex-Post Impact Assessment

## 1. Introduction

The qualifying foreign taxpayer obligation (hereafter: QFTO), which entered into force on 1 January 2015, establishes that non-resident taxpayers in the Netherlands may benefit from the same deductions and tax credits as resident taxpayers only if they earn at least 90% of their global income in the Netherlands. Under this new system, these non-resident workers, if they neither earn 90% of their world income in the Netherlands, nor have a sufficient taxable income in their country of residence, risk forfeiting tax benefits (e.g. mortgage-interest deductions for owner-occupied dwellings). Moreover, the rule may especially impact frontier workers and have detrimental economic effects if such non-resident workers decide against employment in the Netherlands and prefer to work in another country. In such a scenario, employers in border regions should be concerned, given that the majority of non-resident workers are employed in areas along the Dutch border.

In this inventory of the potential impact of the QFTO, we focus on the group of persons who are employed in the Netherlands, but reside outside of the Netherlands, as they are likely the largest group affected by the rule. This 2018 assessment is a continuation of the ex-ante impact assessment of the “90% rule”, published in the 2017 edition of ITEM’s Cross Border Impact Assessment.<sup>72</sup> In comparison to the previous assessment, this assessment includes a more comprehensive impact analysis by looking at the population of non-resident employees in the Netherlands from 2014 to 2016, hence analyzing this population two years before and two years after the introduction of the QFTO. The objective of this preliminary ex-post analysis is to examine trends in the number of non-resident employees in order to see if notable changes occurred in the number and composition of non-resident employees in the Netherlands after the 90%-rule came into force.

The structure of this dossier is as follows. The first part describes the research plan for studying the impact of the QFTO. This part first describes the results of last year’s report. Second, it explains the part of the research plan that will be executed in this dossier. Third, it provides an overview of what research still has to be done. The second part of this dossier describes the data and definitions that are used in the empirical analysis. The third part presents and explains the results of the empirical analysis. Finally, a conclusion is provided, as well as a description of the limitations of this research.

## 2. Research objectives and approach

### 2.1 Themes and indicators: why the 90% rule is important and how to measure its impact

Entered into force on 1 January 2015, the 90%-rule establishes that non-resident taxpayers in the Netherlands may benefit from the same deductions and tax credits as resident taxpayers if they earn 90% of their global income in the Netherlands. The QFTO replaces the optional scheme, under which non-resident taxpayers could opt for the same tax treatment as resident taxpayers, even if earning less than 90% of their global income in the Netherlands. Under the new system, non-resident

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<sup>72</sup> Vink, M., van der Valk, J., Schaper, M., & Schmidt, L. (2017). Cross Border Impact Assessment 2017, Dossier 6. ITEM.

taxpayers only qualify for domestic taxpayer status if they earn 90% of their declared world income in the Netherlands, but they are excluded if their Dutch income is below this threshold.

Both the optional scheme and the QFTO respond to the *Schumacker* decision of the Court of Justice of the European Union (CJEU). The ECJ's preliminary ruling in *Schumacker* obliges EU Member States to grant foreign taxpayers who enjoy all or almost all of their income in the Netherlands the same personal deductions as resident taxpayers.<sup>73</sup> After the CJEU ruled that the enjoyment of these personal benefits as required by EU law cannot be made contingent on the exercise of an option by the taxpayer,<sup>74</sup> the Dutch legislator abolished the optional scheme and enacted a mandatory income threshold (of 90%) as from 2015 to redefine the target group benefiting from the *Schumacker* doctrine. It has been shown that this contradicts the initial position of the legislator when the *Dutch Income Tax Act 2001* was introduced, as well as ECJ decisions explicitly disapproving an arbitrary threshold for defining foreign taxpayers' world income.<sup>75</sup> In February 2017, the CJEU gave a preliminary ruling requested by the Supreme Court in the Netherlands in the case X, also known as the Spanish football broker.<sup>76</sup> In this case, the CJEU ruled that the resident taxpayer in Spain, who earned 60% of his global income in the Netherlands and 40% in Switzerland, was eligible for Dutch mortgage-interest deductions. The CJEU ruling challenges the legislator's definition of the *Schumacker* doctrine in the case of self-employed individuals as it makes the enjoyment of personal tax benefits not dependent on satisfying any particular income threshold, but rather contingent on the issue whether or not these benefits can be enjoyed in the state of residence. Should the state of residence not be in a position to grant these benefits (because it may not tax sufficient income), the CJEU ruled, then the state in which the taxpayer is a non-resident should award them in proportion to the income earned in that state. The Dutch Supreme Court took over this decision in a judgment of May 2017 and referred the case back to the lower court.<sup>77</sup> At the time of writing of this report (1 August 2018) it is unclear how the Dutch authorities will implement this decision through a possible revision of the QFTO.

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<sup>73</sup> CJEU 14 February 1995, Case-279/93 (*Schumacker*), Jur.1995, p. I-225.

<sup>74</sup> CJEU 18 March 2010, Case-440/08 (*Gielen*), NTFR 2010/795, Jur.2010. p. I-2323.

<sup>75</sup> CJEU 10 May 2012, Case C-39/10 (*Commission v. Estonia*), NTFR 2012/1371; ECJ 09 February 2017, Case C-283/15 (X).

<sup>76</sup> CJEU 09 February 2017, Case C-283/15 (X). See also H. Arts and J. Korving, *De kwalificerende buitenlandse belastingplicht van art. 7.8 IB en het EU-recht*. In: *Greenseffectenrapportage 2016*, Institute for Transnational and Euregional cross border cooperation and Mobility/ITEM, pp. 188-198.

<sup>77</sup> Hoge Raad, 12 May 2017, Case 13/03468, ECLI:NL:HR:2017:848.

**Table 1: Principle, Benchmarks and Indicators for assessing the impact of the QFTO on social-economic development**

Theme	Principles	Benchmarks	Indicators
Social-economic development	<p>Freedom of movement for workers (Article 45 TFEU)</p> <p>Freedom of establishment (for self-employed) (Article 49 TFEU)</p> <p>Cross-border mobility as stimulus for social-economic development, especially in border regions.</p>	The situation on 1 January 2015 when the QFTO was introduced.	<p>(this impact study)</p> <p>The number of non-resident workers in the Netherlands before/after the introduction of the QFTO.</p> <p>The different impact by nationality and by employment sector.</p> <p>(in future impact studies)</p> <p>The different impact on persons with full-time / part-time employment and those who are self-employed.</p> <p>Individual mobility and employment trajectories.</p>

Besides the clear legal implications in terms of principles of European integration, in this report we study the impact of the QFTO on social-economic development (see Table 1). Especially, expatriated (i.e. non-resident) Dutch nationals who work in the Netherlands may be adversely affected as they are most likely informed about Dutch tax regulations. A situation is thinkable where a Dutch national bought a property in the country of residence under the assumption to benefit from the same mortgage interest rate deductions ('*hypotheekrentaftrek*') as domestic taxpayers even when earning less than 90% of the world income in the Netherlands. This situation changed as of 1 January 2015 and the individuals earning less than 90% of their world income in the Netherlands no longer benefit from these deductions while being levied payroll taxes. In the case of self-employment, the ECJ considers this law as a violation of the freedom of establishment (Art.49 TFEU).<sup>78</sup>

The qualifying foreign taxpayer obligation (90% rule) likely has an adverse effect on labour mobility in the cross-border region and the number of non-resident workers. This is problematic as many employers benefit from intra-EU labour mobility in the light of labour or skills shortages. It is expected that employers must increase incentives for holding experienced and skilled non-resident workers in their company because the indirect costs for some non-residents increases under the new regulation.

<sup>78</sup> ECJ 16 October 2008, Case C-527/06 (Renneberg), NTFR 2008/2144, Jur. 2008, p. I-7735.

## **2.2 Summary of last year's preliminary ex-ante assessment**

Last year's report analyzed the population of non-resident workers in the Netherlands as of 1 December 2014 to estimate the potential cross-border impact of the QFTO. It found that at that point 131.2 thousand employees worked but did not live in the Netherlands. Most of those non-resident employees lived in Belgium, Germany or Poland. They mostly held the Belgian, Dutch, German, or Polish nationality. German and Belgian non-residents were mostly full-time workers in the Netherlands, whereas Polish employees were often classified as part-time workers. It is expected that part-time workers are less likely to comply with the QFTO than full-time workers, as they might have to generate another source of income somewhere else to fulfill their financial obligations. If the QFTO has an effect on labor mobility, it most likely has a differential effect across work sectors. The report found that the commercial service sector might be most vulnerable to the effects of the QFTO, as most non-resident workers were employed in that sector (65.2%). Finally, concerns about the impact of the QFTO are highest in the Dutch border regions, as the 14 COROP areas along the Dutch-German and Dutch-Belgian border employed the majority of non-resident workers (63.4%). Consequently, if non-resident workers would decide to leave the Netherlands due to the QFTO and decide to work in another country, this could have harmful economic consequences for these border regions.

## **2.3 A preliminary ex-post analysis**

In this year's assessment we replicate and extend last year's analysis and provide a preliminary ex-post impact analysis of the QFTO based on an analysis of the years 2013-2016. The first step after last year's report is to provide a more comprehensive ex-ante approach by estimating the number (and characteristics) of non-resident employees in the Netherlands for the years 2013 and 2014. These are the most recent years before the status of the qualifying foreign tax subject under Article 7.8 of the Dutch Income Tax Act 2001 was amended on the 1<sup>st</sup> of January 2015. This estimation displays how many individuals and which demographic sub-groups are likely to be affected by the change in legislation, and it makes it possible to analyze relevant trends before the QFTO came into place. In addition to this, the estimation serves as a baseline against which the statistics in the ex-post evaluation can be compared.

After this has been accomplished, the same estimation technique can be applied to the years 2015 and 2016, which are the most recent years after the QFTO was implemented, and for which data is available at Statistics Netherlands (in future inquiries more years can be analyzed). This can then serve as a preliminary ex-post analysis of the effects of the 90%-rule, and hence make it possible to not only get a grasp of the potential effects, but also of the real effects of the legislation. This can be done by comparing the trends in the number of non-resident employees in the period before the legislation was implemented (2013, 2014) with that of the period after it came into force (2015, 2016). The expectation is that the 90% rule makes it less attractive to be a non-resident employee in the Netherlands. Hence with this analysis we can see if the number of non-resident employees (relatively) decreases since 2015. In general, we can observe the trends over time in the number of non-resident workers in the Netherlands and the (demographic) characteristics of these workers. The objective of the ex-post analysis is to examine if there is any discontinuation in the trend after the 90%-rule was implemented.

### 3. Data and method

#### 3.1 Data and definitions

The datasets and definitions that are used in this dossier are mostly the same as those in last year's report<sup>79</sup>. As in last year's report, this dossier uses data from the *Polisadministratie* linked with data from the Municipal Personal Records Database (BRP) to identify non-resident workers. Although in this report we use data from the whole period 2013-2016 instead of only for 2014. The *Polisadministratie* data contains information on contracted employees for whom employers withhold payroll tax on their monthly salary. The BRP, on the other hand, contains personal information, such as the address of residence, age, and gender of all individuals who register with and currently live in a Dutch municipality. Consequently, by linking these datasets the number of non-resident employees can be identified. As non-resident employees are defined as those who are subject to payroll tax, but who do not reside in the Netherlands. Hence, these are the persons who are included in the *Polisadministratie*, but who are not registered in the Municipal Personal Records Database (see last year's report for a more comprehensive description of these datasets and the operationalization of non-resident employees). Linking these datasets also provides the opportunity to analyze some background characteristics of this population. Data is available on: gender, age<sup>80</sup>, country of residence, nationality, employment sector, and region of employment.

The background characteristics are conceptualized as follows. Nationality refers to the country where the non-resident employee holds citizenship, whereas country of residence is straightforwardly defined as the country where the non-resident employee resides in. Most non-residents are Belgian, Dutch, German, or Polish and reside in Belgium, Germany or Poland. The statistics in the following empirical analysis are disaggregated accordingly. In the statistics the category "other" refers to all other nationalities or countries of residence. Based on the statistical classification of economic activities in the European Community (NACE), non-residents are also grouped by sector of employment. Jobs are attributed to NACE and then aggregated by four employment sectors: (1) agriculture, (2) industrial jobs, e.g. in textile manufacturing, (3) commercial services in the private sector such as banking, commerce or marketing as well as (4) public and social services including teachers or nursing jobs. Moreover, the dossier defines border regions as the Dutch NUTS3/COROP areas that are directly located along the Dutch-Belgian and Dutch-German borders. The Netherlands counts 40 COROP regions, with 14 of them being border regions. Five of those border regions are located along the Belgian border (Zeeuwsch-Vlaanderen, Overig Zeeland, West-Noord-Brabant, Midden-Noord-Brabant, Zuidoost-Noord-Brabant), seven along the German border (Oost-Groningen, Zuidoost-Drenthe, Noord-Overijssel, Twente, Achterhoek, Arnhem/Nijmegen, Noord-Limburg), and two (Midden-Limburg and Zuid-Limburg) share a border with both Belgium and Germany. Our definition of border region only refers to the Netherlands, but excludes German or Belgian NUTS3 regions that share a border with the Netherlands. To date this information is not available because only the country but not the exact address of residence outside the Netherlands is available from the data on non-resident workers.

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<sup>79</sup> Vink, M., van der Valk, J., Schaper, M., & Schmidt, L. (2017). Cross Border Impact Assessment 2017, Dossier 6. ITEM

<sup>80</sup> Since information on the age group distribution among non-resident workers is only available for, on average, 33 per cent of the research population, the information about this variable is not used in the analysis.

### **3.2 Data changes compared to the previous report**

The data that is used in the current analysis is not completely the same as the data used in the previous assessment of the cross-border impact of the qualifying foreign taxpayer obligation. There are several reasons for this. First of all, Statistics Netherlands has implemented a new approach to determine the working location of employees. Hence, this potentially alters the reported number of non-resident employees in cross-border regions, which is a major statistic in our analysis. The changed methodology is applied retroactively until 2014. So for the years before 2014 the old methodology is still used. Consequently, any changes in the working location of non-resident employees occurring between the years 2013 and 2014 are due to real changes and/or changes in methodology, and should therefore be treated with caution.

Secondly, datasets at Statistics Netherlands are not fixed and are constantly updated if new information becomes available. This can lead to discrepancies if the same year is analyzed in two different periods. In this case, the year 2014 was analyzed in last year's report, but it is also analyzed in the current report. The results for the same year (2014) are expected to differ to some extent due to the fact that the current dataset contains more up-to-date information compared to the dataset last year.

Thirdly, statistical offices normally focus their data generation and analysis on people living within the borders of the respective country. Collecting statistics on the country of residence of non-resident employees is new and therefore involves significant challenges. Since the methodology for collecting such statistics is continuously being refined, it is not surprising some discrepancies exist between the results of the current analysis and the analysis carried out last year.

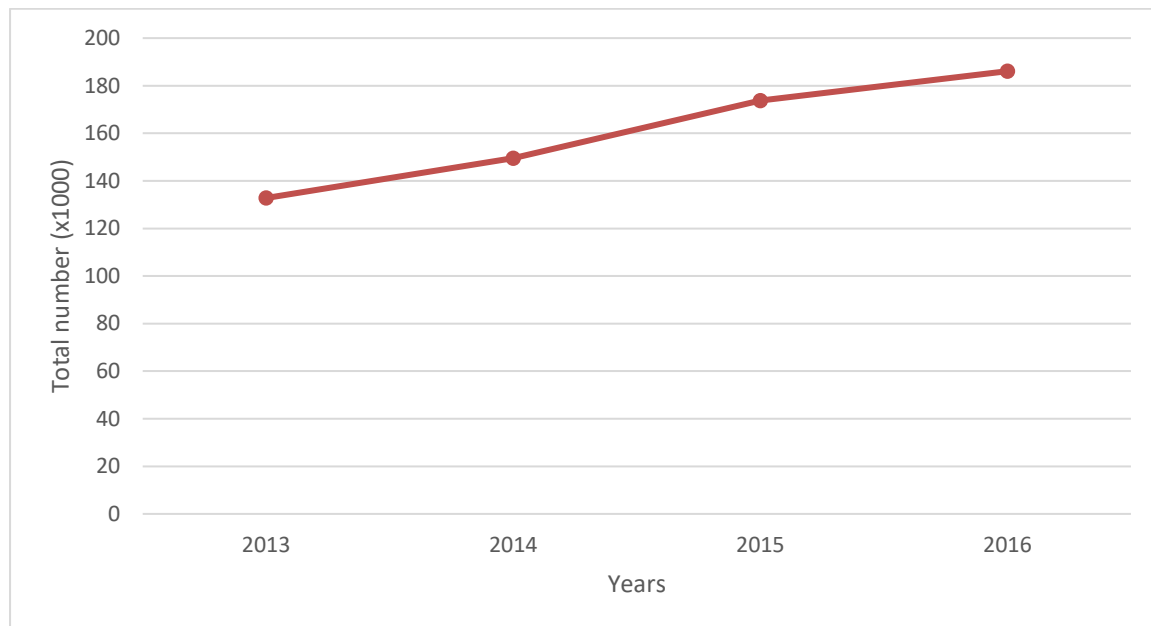
Finally, in contrast to the previous report, there is no data available on the employment status of non-resident employees. This means that we cannot assess if a non-resident employee works part-time or full-time. In the absence of usable tax data (see section 4.2 for more information about this), data on employment status could give a first indication of the number of non-resident employees who do not earn 90% of their income in the Netherlands. As it is expected that part-time workers are less likely to comply with the 90% rule than full-time workers, as they might have to generate another source of income in another country to fulfill their financial obligations. The reason why this data is not available is that it could not be delivered and added to the new database before the publication of this report. It is expected that it will be added to the database soon, and therefore could be analyzed for future inquiries.

## **4. Empirical Analysis**

In this section a comprehensive ex-ante analysis and a preliminary ex-post analysis is provided for the assessment of the impact of the QFTO on non-resident workers in the Netherlands. Special emphasis is placed on the Dutch cross-border regions, as these regions are most dependent on non-resident workers, and should therefore be most concerned about any negative effects of the rule on the labor

mobility of non-resident workers. This section first provides a general overview of non-resident workers in the Netherlands, and then zooms in on the border regions.

**Figure 1: Number of non-resident employees for the years 2013-2016**



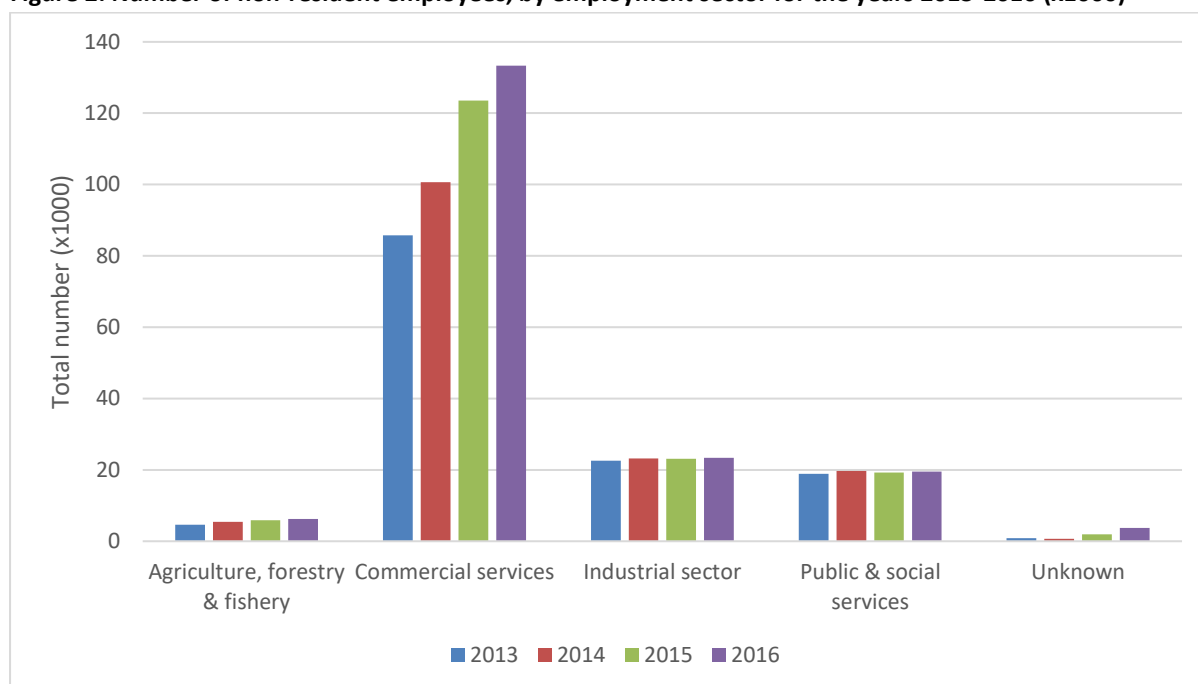
Source: Statistics Netherlands

#### 4.1 General overview of non-resident workers in the Netherlands

Figure 1 shows the number of non-resident workers in the Netherlands for the years 2013-2016. The exact numbers can be found in Table 2, as well as the nationalities and countries of residence of the non-resident employees. As can be seen from Figure 1, the number of non-resident employees has increased considerably over the period 2013-2016. Where in 2013 the number of non-resident employees was a little more than 130.000, this number increased to over 185.000 in 2016. This is a 40% increase in just four years. This increase, however, is mainly due to the large influx of Polish non-resident workers in this period. As Table 2 shows, the number of non-resident Polish workers increased from 45.800 in 2013 to 82.300 in 2016, an increase of 36.500 workers. This makes them by far the largest group of non-resident workers in the Netherlands. These Polish workers mostly reside in Poland (77.200 out of 82.300 Polish non-resident workers in 2016), although a few thousand Polish non-residents live in Germany. Also, the number of non-resident workers with other nationalities than Belgian, Dutch, German, or Polish increased considerably over the period 2013-2016 (from 11.800 to 26.000). Most of them live in countries other than Belgium, Germany, or Poland. Although these results are interesting, it is expected, especially for those residing in Poland, that these workers mostly just temporarily work in the Netherlands.<sup>81</sup>

<sup>81</sup> CBS. (2018, May). "Third of Polish workers still here after 5 years." Retrieved from: <https://www.cbs.nl/en-gb/news/2018/18/third-of-polish-workers-still-here-after-5-years>.

**Figure 2: Number of non-resident employees, by employment sector for the years 2013-2016 (x1000)**



Source: Statistics Netherlands

**Table 2: Number of non-resident employees by country of residence and nationality, 2013-2016 (x1000)**

Country of residence			2013	2014	2015	2016
Belgium	Nationality	BE	13.9	14.1	14.2	14.7
		DE	0.2	0.2	0.2	0.2
		NL	20.9	21.1	21.0	21.1
		PL	0.3	0.3	0.3	0.4
		Other	1.2	1.4	1.4	1.5
	Total		36.6	37.1	37.2	37.9
Germany	Nationality	DE	15.4	14.2	14.3	13.9
		NL	15.8	16.1	16.3	16.4
		PL	2.7	2.8	4.1	4.6
		Other	1.8	1.9	2.0	2.8
	Total		35.8	35.1	36.9	37.8
Poland	Nationality	DE	0.9	0.9	0.9	0.8
		NL	0.9	0.9	1.1	1.2
		PL	42.8	53.9	71.5	77.2
		Other	0.5	0.6	0.4	0.4
	Total		45.0	56.3	73.9	79.5
Other	Nationality	NL	3.4	4.2	4.1	4.4
		PL	0.1	0.1	0.1	0.1
		Other	11.8	16.7	21.4	26.0
	Total		15.4	21.2	25.9	30.8



Total	Nationality	BE	DE	NL	PL	Other
		14.1	14.2	14.4	14.9	
		16.6	15.5	15.5	15.1	
		41.0	42.4	42.6	43.1	
		45.8	57.0	76.0	82.3	
		15.3	20.5	25.2	30.7	
	Total	132.8	149.6	173.8	186.1	

Source: Statistics Netherlands

We expect those non-resident workers who commute to the Netherlands on a day-to-day basis to be living in Belgium or Germany, as these are the countries directly bordering the Netherlands. The strong increasing trend in non-resident employees cannot be observed for these countries. The number of non-resident workers living in Belgium and Germany increased just slightly: from 36.600 to 37.900 workers for Belgium and from 35.800 to 37.800 workers for Germany. Not surprisingly, Belgian non-residents mostly live in Belgium, whereas German non-residents predominantly live in Germany. The number of non-resident workers with the Belgian nationality increased from 14.100 to 14.900 in the period 2013-2016, whereas the number of non-resident workers with the German nationality shows a decrease over time, from 16.600 in 2013 to 15.100 in 2016. The earlier described increase in the number of non-resident workers living in Germany is due to the increase of workers with the Polish or other nationalities, which offsets the decrease in workers with the German nationality. When we look at Dutch non-residents we see that they mostly live in Belgium or Germany. The total number of Dutch non-resident workers increased from 41.000 in 2013 to 43.100 in 2016.

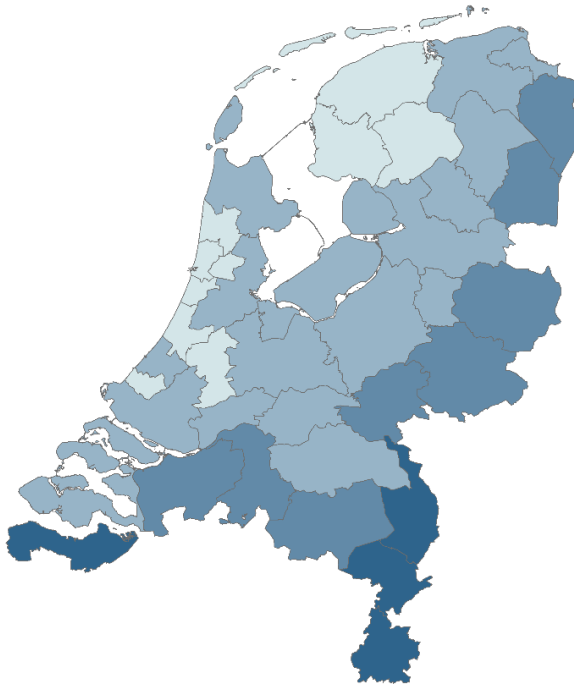
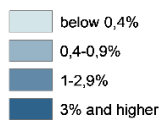
Besides country of residence and nationality, there are also other characteristics of non-resident employees that are worth investigating. Looking at gender, as displayed in Table A.1 of the appendix, we see that on average two-thirds of the non-residents are male, and one-third are female. This proportion has stayed almost the same over the period 2013-2016. Nevertheless, we do note some differences when we look at country of residence. For Belgium we see a more balanced share of man and woman, whereas for “other” countries we see an even higher proportion of male compared to female non-resident employees.

Figure 2 shows in which employment sectors the non-residents work for the years 2013-2016. Tables A.2-A.5 display the exact numbers, as well as a disaggregation by the nationality of the non-resident workers. Most non-resident workers work in commercial services. These non-resident workers mainly have the Polish nationality. It is therefore not surprising that the number of non-residents employed in the commercial sector increased sharply since 2013 (from 85.800 in 2013 to 133.300 in 2016), corresponding with the large increase in the number of Polish non-residents over the same period. The number of non-residents working in the industrial sector or public and social services remains fairly constant around 20.000. Both these sectors mainly employ Dutch nationals, although there is also a considerable share of Belgians and Germans working in these sectors. Few non-residents work in agriculture, forestry, and fishery and there are also no notable changes visible. It is important to note that Statistics Netherlands only collects data from registered non-residents. The number of non-registered non-resident workers working in agriculture, fishery, and forestry might be much higher.

#### 4.2 Non-resident workers in the cross-border regions

More than half of the non-resident employees work in the cross-border regions. Most of these non-resident workers live in either Belgium or Germany (see Table A.7 in the appendix). Unsurprisingly, most non-resident workers in cross-border regions at the German border live in Germany, whereas those at the Belgian border live in Belgium. Border regions which share a border with both Belgium and Germany (Midden-Limburg and Zuid-Limburg) employ mostly Belgian residents, although they do also employ a considerable number of German residents. Most Polish non-resident workers work in the other Dutch COROP/NUTS3 regions. Although the share of Polish workers in the total number of non-residents in the cross-border regions has increased considerably.

**Figure 3: Non-resident employees living in Belgium or Germany by all NUTS3/COROP regions, in percentages of the total working labor force for the year 2016**



*Note: For around 25%-30% of the workers it is not known in which COROP region they work. These percentages, however, are similar for both resident workers and non-resident workers. Therefore, the percentages will most likely approximate the real percentages, although they must be considered with caution.*

*Source: Statistics Netherlands*

Nevertheless, in this report we focus on German and Belgian residents for assessing the potential impact of the QFTO on cross-border regions, as these are still the largest group of non-residents in these regions. Furthermore, they are more likely to commute on a day-to-day basis and to have long-term employment contracts. Table A.8 shows the number of non-resident employees living in Belgium or Germany as a percentage of the total labor force of the respective border region. Table A.9 shows this for all Dutch COROP regions. Figure 3 represents the same data as Table A.9 as a map with all the Dutch COROP regions. In the figure, only the data for 2016 are shown because there are not many changes over time. It is important to note that for 25%-30% (depending on the year) of the workers it is not (yet) known in which cross border region they work. These percentages, however, are similar for both resident workers and non-resident workers. Therefore, the percentages will most likely approximate the real percentages, although they must be considered with caution. For non-cross border regions, the number of Belgian and German non-resident workers is never higher than 0.9% of the total working population. For cross border regions, however, we see that German and Belgian residents on average occupy a much larger share of the total working population. This holds especially for those regions that share a border with both Germany and Belgium. In Midden-Limburg 3.6% of the working population in 2016 lived in either Belgium or Germany, while in Zuid-Limburg this was 5.6%. For Midden-Limburg these shares remained almost constant over the period 2013-2016, while for Zuid-Limburg we see a slight decrease (from 6.2% in 2013). For the other cross border regions, we also do not note much variation over time. This is illustrated by the fact that the percentage of non-resident workers residing in Belgium or Germany over the total Dutch working population remains constant at 1% over the period 2013-2016 (see Table A.9).

#### **4.3 A preliminary ex-post analysis: a changing trend over time?**

From the figures we have seen so far, can we observe a change in the trend of the number and composition of non-resident workers in the Netherlands in the period after the QFTO came into force (2015-2016) compared to the period before that (2013-2014)? First of all, when we look at the total number of non-resident workers we see an increasing trend, which is persistent over time and does not seem to have been altered since the implementation of the QFTO. For the nationality and work sector of non-residents we also observe a solid trend over the whole period 2013-2016; the number of Polish and “other” nationals increases, as well as the number of non-residents working in commercial services. For the border regions there are also no significant changes visible. The two border regions which are in potential most affected by the QFTO, those that share a border with both Belgium and Germany, employ an almost equal share of Belgian and German residents as a percentage of their total labor force over the period 2013-2016. Although for Zuid-Limburg we observe a slight decrease, this trend is not shared with other cross-border regions. Overall, this preliminary ex-post analysis does not seem to show any compelling effects of the QFTO on the number and composition of non-resident workers in the Netherlands and the Dutch cross border regions. However, this analysis does not allow us to focus on those individuals that are most likely affected by the QFTO (those who do not earn 90% of their world income in the Netherlands). Furthermore, the possible delayed effects of the rule cannot yet be assessed, as data is only available until 2016. We address these limitations in the conclusion.

## 5. Conclusion, limitations and future research

### 5.1 Conclusion

In conclusion, this dossier has provided an overview of non-resident employees in the Netherlands over the period 2013-2016 as to assess the potential and (preliminary) real impact of the Qualifying Foreign Taxpayer Obligation (“90% rule”). From 2013 to 2016 the number of non-resident employees has increased considerably from around 133.000 in 2013 to around 186.000 in 2016. This increase is mostly due to the increase of Polish non-resident workers. The number of Belgian, Dutch and German non-resident employees remains fairly constant. Most of the non-resident workers work in the commercial sector. This sector also experienced the highest increase in non-resident workers, which corresponds with the fact that most Polish workers are employed in that sector. Most Belgian and German non-residents work in the Dutch border regions. Especially those regions that share a border with both Belgium and Germany employ a relatively high amount of Belgian and German residents, as compared to their total workforce. These regions are therefore most vulnerable to any negative consequences of the QFTO, as non-resident workers who do not earn 90% of their world income in the Netherlands might decide against employment in these regions. In a first preliminary ex-post analysis, however, this report has not found any effect of the QFTO. Looking at the trends in the number and composition of non-resident workers there are no notable differences visible in the period before the QFTO was implemented (January 2015), compared to the period thereafter.

### 5.2 Limitations

This report has served as a first attempt to provide an ex-post analysis of the impact of the QFTO. By looking at the trends of non-resident employees and their background characteristics, we have obtained a better idea of the potential and the real impact of this legislation. However, without income data it is impossible to identify the exact group of non-resident employees who are expected to be affected by the QFTO (those who earn less than 90% of their world income in the Netherlands). Since these data were not yet available at the time of the completion of this report, it is not possible to fully assess the group of non-resident workers who are most likely to be affected by the 90%-rule, and hence to execute a complete ex-post analysis on this. The reasons for this are mostly the same as the ones described in last year’s report. For instance, the processed tax returns are still only complete for the fiscal year 2014, and the tax registry data still does not include a variable indicating the exact income situation of non-resident employees. The reason why this information is not yet available is that the process of obtaining, cleaning and analyzing the data of the *Polisadministratie* combined with the Municipal Personal Records Database (and the feedback loops inherent to them) has captured considerable time and resources, and therefore there was not enough time left to fully and accurately process the tax data. For future inquiries into this topic the data from the *Polisadministratie* combined with the Municipal Personal Records Database should be available.

Another important limitation of the current analysis, and a fruitful avenue for future research, is that we do not know what exactly happens when the number of non-resident employees changes. For instance, when the QFTO would indeed lead to less non-resident workers is this then due to the fact that more non-resident employees moved to the Netherlands or does it mean that they stopped working in the Netherlands altogether. The latter scenario would be problematic for the Dutch cross-border regions, while the former scenario seems not to be so, and could even be economically

beneficial (more demand for housing, more income is spent in the Netherlands, etc.). Although from the point of view of European integration, any negative impact on labor and housing mobility would be problematic, to accurately determine what the QFTO means for cross-border regions it is important to know what the drivers are behind the change in non-resident employees. Future inquiries should therefore focus on the exact behavior of non-resident employees since the QFTO was implemented, and compare them with the period before that.

### 5.3 What is next?

In order to address these limitations and to execute a more comprehensive ex post impact analysis of the QFTO, we plan to take the following steps in subsequent iterations of this report.

- *Combining the datasets: following individuals over time.* In order to follow individual persons over time, in order to analyse mobility and employment trajectories, the data from the *Polisadministratie* needs to be combined with the Municipality Personal Records (BRP). By coupling the Random Identification Numbers (RIN) of any person who has been a non-resident employee in the Netherlands for the period 2013-2016, we can analyze on the individual level how the number of non-resident employees fluctuates and what the characteristics of these individuals are. This could potentially answer the following (non-exhaustive) list of questions: How many individuals who first where non-resident employees have migrated to the Netherlands? How many individuals who first where non-resident employees do not work in the Netherlands anymore? How many individuals have become non-residents over time? To what type (gender, nationality, etc.) of individuals does this apply, and where do these individuals live (e.g. cross border regions)? The answers to these questions can give a further idea on the effect of the QFTO on the housing and labor mobility of non-resident workers in the Netherlands. Furthermore, longitudinal modelling techniques could be applied to assess if there is a trend break in the data at the time when the QFTO was implemented.
- *Analyzing the income data from the Dutch Tax Authority.* Those who do not earn 90% of their world income in the Netherlands are most likely to be affected by the QFTO and may have either moved to the Netherlands (to become a resident employee) or have stopped working in the Netherlands altogether. While the total number of non-resident employees already gives a good indication of the potential group of affected individuals, knowledge about the compliance to the 90% rule gives a much more detailed and sophisticated picture. The tax registry data from the Dutch Tax Authority does contain information about the compliance to the 90% rule of non-resident workers. Hence, when this data becomes available the potential effects of the QFTO can be more sophisticatedly analyzed. For the income data it is also possible to combine the data over time.
- *Analyzing the Polisadministratie/BRP data combined with the income data.* In the final step, dependent on the availability and the quality of the data, the individual data from the *Polisadministratie*/BRP dataset can be combined with the income data. This would create a longitudinal dataset with income data for each individual (to indicate compliance to the 90% rule) and individual data on demographic characteristics, country of residence, nationality, employment

status and sector, and the region of employment in the Netherlands. This rich amount of data would make the dataset well suitable for statistical analyses in order to estimate with regression and/or time-series techniques the impact of the QFTO on housing and labor mobility of non-resident employees.

## Appendix

**Table A.1: Gender distribution among non-resident workers by country of residence, 2013-2016 (%)**

Country of residence	2013		2014		2015		2016	
	Male	Female	Male	Female	Male	Female	Male	Female
Belgium	58.5	41.5	59.0	41.0	59.0	41.0	59.3	40.7
Germany	69.3	30.7	68.2	31.8	68.1	31.9	67.7	32.3
Poland	66.9	33.1	64.9	35.1	63.9	36.1	64.5	35.5
Other	86.2	13.8	80.6	19.4	79.8	20.2	79.0	21.0
Total	67.5	32.5	66.4	33.6	66.1	33.9	66.5	33.5

Source: Statistics Netherlands

**Table A.2: Number of non-resident employees by nationality and sector, 2013 (x1000)**

Nationality	Commercial services	Agriculture, forestry & fishery	Public &	Industrial sector	Unknown	Total
			social services			
Belgian	6.4	0.1	3.7	3.9	0.0	14.1
German	10.5	0.2	1.2	4.6	0.1	16.6
Dutch	19.2	0.3	13.0	8.3	0.2	41.0
Other	10.9	0.2	0.8	3.3	0.1	15.3
Polish	38.7	3.9	0.2	2.5	0.5	45.8
Total	85.8	4.7	18.9	22.6	0.9	132.8

Source: Statistics Netherlands

**Table A.3: Number of non-resident employees by nationality and sector, 2014 (x1000)**

Nationality	Commercial services	Agriculture, forestry & fishery	Public &	Industrial sector	Unknown	Total
			social services			
Belgian	6.5	0.1	3.6	4.0	0.0	14.2
German	9.7	0.2	1.3	4.2	0.0	15.5
Dutch	20.0	0.3	13.5	8.4	0.2	42.4
Other	15.0	0.4	1.0	4.0	0.2	20.5
Polish	49.5	4.5	0.2	2.6	0.3	57.0
Total	100.7	5.5	19.7	23.2	0.7	149.6

Source: Statistics Netherlands

**Table A.4: Number of non-resident employees by nationality and sector, 2015 (x1000)**

<b>Nationality</b>	<b>Commercial services</b>	<b>Agriculture, forestry &amp; fishery</b>	<b>Public &amp; social services</b>	<b>Industrial sector</b>	<b>Unknown</b>	<b>Total</b>
Belgian	6.7	0.1	3.6	4.0	0.0	14.4
German	10.0	0.1	1.3	4.0	0.0	15.5
Dutch	20.6	0.3	13.2	8.3	0.2	42.6
Other	19.1	0.6	0.9	4.1	0.4	25.2
Polish	67.0	4.7	0.3	2.7	1.3	76.0
<b>Total</b>	<b>123.6</b>	<b>5.9</b>	<b>19.3</b>	<b>23.1</b>	<b>1.9</b>	<b>173.8</b>

Source: Statistics Netherlands

**Table A.5: Number of non-resident employees by nationality and sector, 2016 (x1000)**

<b>Nationality</b>	<b>Commercial services</b>	<b>Agriculture, forestry &amp; fishery</b>	<b>Public &amp; social services</b>	<b>Industrial sector</b>	<b>Unknown</b>	<b>Total</b>
Belgian	7.0	0.1	3.6	4.2	0.1	14.9
German	9.6	0.1	1.4	3.9	0.1	15.1
Dutch	21.0	0.3	13.2	8.3	0.3	43.1
Other	24.1	0.7	1.0	4.2	0.6	30.7
Polish	71.6	5.0	0.2	2.8	2.6	82.3
<b>Total</b>	<b>133.3</b>	<b>6.2</b>	<b>19.5</b>	<b>23.4</b>	<b>3.8</b>	<b>186.1</b>

Source: Statistics Netherlands



**Table A.6: Non-resident employees by all NUTS1 and NUTS3/COROP regions, in percentages of the total number of non-resident employees for the years 2013-2016**

NUTS1 region	NUTS3/COROP region	2013	2014	2015	2016
Northern Netherlands	Oost-Groningen	0.2	0.2	0.1	0.1
	Delfzijl en omgeving	0.2	0.2	0.2	0.1
	Overig Groningen	0.4	0.8	0.8	0.7
	Noord-Friesland	0.1	0.2	0.2	0.2
	Zuidoost-Friesland	0.1	0.2	0.3	0.3
	Noord-Drenthe	0.2	0.4	0.5	0.5
	Zuidoost-Drenthe	1.0	0.9	0.8	0.7
	Zuidwest-Drenthe	0.2	0.3	0.3	0.4
Eastern Netherlands	Noord-Overijssel	0.6	1.1	1.0	1.0
	Zuidwest-Overijssel	0.3	0.3	0.4	0.5
	Twente	1.2	1.0	0.9	1.1
	Veluwe	1.1	1.3	1.2	1.4
	Achterhoek	1.9	1.7	1.7	1.8
	Arnhem/Nijmegen	3.0	2.7	3.0	3.1
	Zuidwest-Gelderland	1.5	1.8	1.6	1.5
	Flevoland	0.5	1.0	0.9	0.9
Western Netherlands	Utrecht	2.0	1.7	1.7	1.8
	Kop van Noord-Holland	0.7	1.4	1.4	1.6
	Alkmaar en omgeving	0.2	0.4	0.5	0.3
	Ijmond	0.4	0.5	0.6	0.4
	Agglomeratie Haarlem	0.5	0.5	0.5	0.5
	Zaanstreek	0.2	0.3	0.3	0.3
	Groot Amsterdam	4.6	6.3	6.7	6.2
	Het Gooi en Vechtstreek	0.2	0.2	0.2	0.2
	Agglomeratie Leiden en Bollenstreek	0.9	1.8	0.8	1.0
	Agglomeratie 's-Gravenhage	1.6	2.7	3.0	3.2
	Delft en Westland	1.6	2.6	4.1	4.3
	Oost Zuid-Holland	0.5	0.7	0.7	0.8
	Groot-Rijnmond	4.6	5.3	5.3	5.1
	Zuidoost Zuid-Holland	0.9	1.3	0.9	1.0
	Zeeuwsch-Vlaanderen	1.0	1.2	1.0	0.9
Overig Zeeland	0.4	0.5	0.4	0.5	
Southern Netherlands	West Noord-Brabant	4.8	5.0	5.1	5.0
	Midden Noord-Brabant	2.7	3.3	3.2	3.2
	Noordoost Noord-Brabant	1.7	1.7	1.9	1.8
	Zuidoost Noord-Brabant	6.2	6.9	6.7	6.5
	Noord-Limburg	7.0	7.4	7.3	7.1
	Midden-Limburg	2.1	1.9	2.1	2.2
	Zuid-Limburg	8.2	7.2	6.3	6.1
Missing		34.6	25.3	25.3	25.8
Total		100	100	100	100

Source: Statistics Netherlands. *Note: The number of non-residents for which the COROP region in which they worked was unknown was 45.876 in 2013, 37.916 in 2014, 43.918 in 2015, and 48.015 in 2016. This means that the presented percentages might not be fully accurate.*

**Table A.7: Non-resident employees by NUTS3/COROP border regions, aggregated by nationality for the years 2013-2016 (x1000)**

<b>NUTS3/COROP region</b>	<b>Country of residence</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>
Midden-Limburg	Belgium	1.4	1.4	1.4	1.4
	Germany	1.0	1.0	1.1	1.2
	Poland	0.3	0.3	1.0	1.3
	Other	0.1	0.1	0.2	0.2
	Total	2.8	2.9	3.7	4.1
Zuid-Limburg	Belgium	8.2	7.3	7.2	7.3
	Germany	2.3	2.7	2.8	3.0
	Poland	0.3	0.5	0.7	0.6
	Other	0.1	0.3	0.3	0.4
	Total	10.9	10.8	11.0	11.3
All NUTS3/COROP regions along the German border	Belgium	0.9	1.2	1.2	1.3
	Germany	11.6	11.1	12.4	12.7
	Poland	1.4	2.0	2.3	3.1
	Other	5.8	8.2	9.8	10.4
	Total	19.8	22.4	25.7	27.6
NUTS3/COROP regions along the Belgian border	Belgium	11.6	12.2	12.2	12.2
	Germany	2.3	2.2	2.4	2.5
	Poland	1.2	2.1	3.1	4.1
	Other	4.9	8.7	10.9	11.2
	Total	20.0	25.2	28.6	29.9

Source: Statistics Netherlands. *Note: The number of non-residents for which the COROP region in which they worked was unknown was 45.876 in 2013, 37.916 in 2014, 43.918 in 2015, and 48.015 in 2016. This means that the presented numbers are an underestimation of the real numbers.*

**Table A.8: Non-resident employees living in Belgium or Germany by NUTS3/COROP border regions, in percentages of the total working labor force for the years 2013-2016**

<b>Border country</b>	<b>NUTS3/COROP region</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>
Belgium	Zeeuwsch Vlaanderen	3.8	4.4	4.4	4.3
	Overig Zeeland	0.4	0.4	0.5	0.4
	West-Noord-Brabant	1.9	1.7	1.7	1.6
	Midden-Noord-Brabant	1.4	1.3	1.3	1.3
	Zuidoost-Noord-Brabant	2.1	2.2	2.1	2.1
Germany	Oost-Groningen	1.4	1.0	1.0	1.0
	Zuidoost-Drenthe	2.1	1.7	1.5	1.6
	Noord-Overijssel	0.4	0.6	0.5	0.5
	Twente	1.2	1.2	1.2	1.2
	Achterhoek	2.7	2.4	2.6	2.8
	Arnhem/Nijmegen	1.3	1.4	1.6	1.5
	Noord-Limburg	4.0	3.8	4.2	4.3
Both Belgium and Germany	Midden-Limburg	3.3	3.5	3.5	3.6
	Zuid-Limburg	6.2	5.8	5.6	5.6

Source: Statistics Netherlands. *Note: For around 25%-30% of the workers it is not known in which COROP region they work. These percentages, however, are similar for both resident workers and non-resident workers. Therefore, the percentages will most likely approximate the real percentages, although they must be considered with caution.*

**Table A.9: Non-resident employees living in Belgium or Germany by all NUTS1 and NUTS3/COROP regions, in percentages of the total working labor force for the years 2013-2016**

NUTS1 region	NUTS3/COROP region	2013	2014	2015	2016
Northern Netherlands	Oost-Groningen	1.4	1.0	1.0	1.0
	Delfzijl en omgeving	0.9	0.6	0.8	0.7
	Overig Groningen	0.3	0.4	0.5	0.5
	Noord-Friesland	0.1	0.2	0.2	0.3
	Zuidoost-Friesland	0.1	0.2	0.3	0.3
	Noord-Drenthe	0.2	0.4	0.3	0.4
	Zuidoost-Drenthe	2.1	1.7	1.5	1.6
	Zuidwest-Drenthe	0.5	0.4	0.4	0.6
Eastern Netherlands	Noord-Overijssel	0.4	0.6	0.5	0.5
	Zuidwest-Overijssel	0.5	0.4	0.7	0.7
	Twente	1.2	1.2	1.2	1.2
	Veluwe	0.4	0.4	0.5	0.5
	Achterhoek	2.7	2.4	2.6	2.8
	Arnhem/Nijmegen	1.3	1.4	1.6	1.5
	Zuidwest-Gelderland	0.7	0.5	0.5	0.5
	Flevoland	0.3	0.4	0.4	0.4
Western Netherlands	Utrecht	0.4	0.3	0.4	0.4
	Kop van Noord-Holland	0.1	0.7	0.5	0.5
	Alkmaar en omgeving	0.1	0.3	0.3	0.3
	Ijmond	0.1	0.2	0.3	0.3
	Agglomeratie Haarlem	0.1	0.3	0.2	0.3
	Zaanstreek	0.1	0.3	0.2	0.3
	Groot Amsterdam	0.3	0.4	0.4	0.4
	Het Gooi en Vechtstreek	0.2	0.2	0.3	0.4
	Agglomeratie Leiden en Bollenstreek	0.3	0.2	0.2	0.2
	Agglomeratie 's-Gravenhage	0.3	0.4	0.4	0.4
	Delft en Westland	0.2	0.3	0.3	0.3
	Oost Zuid-Holland	0.3	0.4	0.3	0.3
	Groot-Rijnmond	0.4	0.5	0.5	0.5
	Zuidoost Zuid-Holland	0.5	0.6	0.5	0.5
	Zeeuwsch-Vlaanderen	3.8	4.4	4.4	4.3
Overig Zeeland	0.4	0.4	0.5	0.4	
Southern Netherlands	West Noord-Brabant	1.9	1.7	1.7	1.6
	Midden Noord-Brabant	1.4	1.3	1.3	1.3
	Noordoost Noord-Brabant	0.6	0.6	0.6	0.7
	Zuidoost Noord-Brabant	2.1	2.2	2.1	2.1
	Noord-Limburg	4.0	3.8	4.2	4.3
	Midden-Limburg	3.3	3.5	3.5	3.6
	Zuid-Limburg	6.2	5.8	5.6	5.6
Missing		1.1	1.0	1.0	1.0
Total		1.0	1.0	1.0	1.0

Source: Statistics Netherlands. *Note: For around 25%-30% of the workers it is not known in which COROP region they work. These percentages, however, are similar for both resident workers and non-resident workers. Therefore, the percentages will most likely approximate the real percentages, although they must be considered with caution.*

### 3.3 Schemes relating to retirement ages in NL/BE/DE: a multidisciplinary analysis

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## Abbreviations

AltZertG	Altersvorsorgeverträge-Zertifizierungsgesetz (Gesetz über die Zertifizierung von Altersvorsorge und Basisrentenverträgen) (German Pension Act)
AOW	Algemene Ouderdomswet (Dutch State Pension Act)
BE	Belgium
CBS	Centraal Bureau voor de Statistiek (Statistics Netherlands)
DE	Germany
EC	European Commission.
EU	European Union
NL	The Netherlands
RVA	Rijksdienst voor Arbeidsvoorziening (National Employment Office)
SGB	Sozialgesetzbuch (German Social Insurance Code)
SVB	Sociale Verzekeringsbank (Dutch Social Insurance Bank)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union.
Wet LB	Wages and Salaries Tax Act 1964

# Schemes relating to retirement ages in NL/BE/DE: a multidisciplinary analysis

## 1. Introduction

Pensions in the border regions continue to demand attention, not merely from a fiscal point of view but also from the perspective of social security and pension law; the field of pensions is multidisciplinary.<sup>82</sup> One of the main pension-related bottlenecks in our border regions are the different retirement ages in The Netherlands, Belgium and Germany. In addition to the fact that cross-border pensions may have different start dates, there may also be adverse consequences for taxation<sup>83</sup> and social security. It is a discoordination between the measures taken in the states of work and residence that causes problems with cross-border workers' pension rights or benefits. This dossier therefore includes a (multidisciplinary) ex-ante/ex-post analysis of the cross-border impact of the differences in national legislations relating to retirement age in the Netherlands, Belgium and Germany. Its focus will be on statutory (first-pillar) pensions, i.e. the Dutch AOW old age pension, the German *Regelaltersrente* and the Belgian *Rustpensioen*, as well as supplementary (second-pillar) pensions.

There is no European pension legislation within the European Union, nor is there a common European retirement age. The different European Member States each have their own retirement ages for both statutory and supplementary pensions, which differ considerably. Cross-border workers who have worked in different Member States are faced with different start dates and a wide range of options and impossibilities for making these start dates more flexible. As the pensions of cross-border workers comprise several pensions from different Member States, due to their mobility, and each pension has its own start date, the start date of their full pension is determined by the Member State with the highest retirement age.<sup>84</sup> As a result, depending on their personal income situation, cross-border workers may face a shortfall in income in the period between leaving the labour market and the pension stage, which may jeopardize the adequacy of the pension as a provision for old age.

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<sup>82</sup> ITEM analysed the fiscal impact of the Dutch-German tax treaty on pensions as part of the 2016 Cross-border Impact Assessment, accessible via the ITEM website:

<<https://www.maastrichtuniversity.nl/nl/onderzoek/instituten/item/onderzoek/studie-grenseffectenbeoordeling#report2016>>.

<sup>83</sup> See also comments OECD model convention, art. 18, par. 8: *“the international mobility of individuals...has significantly increased the importance of cross-border issues arising from the interaction of the different pension arrangements which exist in various States and which were primarily designed on the basis of purely domestic policy considerations”*. In addition, the OECD model convention, art. 18, par. 10 states that: *“Other issues arise from the existence of very different arrangements to provide retirement benefits (i.e. statutory social security schemes, occupational pension schemes, individual pension schemes). The interaction between these three categories of arrangements presents particular difficulties.”*

<sup>84</sup> Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 314.

## **A case**

The above can be illustrated by an example.<sup>85</sup> Imagine a 65 year-old cross-border worker (born in 1953) who resides in Belgium, works in the Netherlands and has accrued Dutch and Belgian statutory and supplementary pensions.

If this worker has not worked in the Netherlands as a cross-border worker, he will be assumed to have worked in Belgium, in which case his Belgian legal and supplementary pension start from age 65. If he has worked in the Netherlands, he will not be able to retire until he is 66, effective 2021 (Dutch statutory pension; AOW). Dutch supplementary pensions are targeted to start at age 68. If his Belgian pension is not sufficient, he may decide to work part-time in the Netherlands until he reaches age 68. If this person works in Belgium and has accrued Dutch and Belgian pensions, he can claim his Belgian pension as early as age 62. He will not receive his Dutch statutory pension, however, until he has reached the current Dutch statutory retirement age of 66 years. In October 2017 this age was still 65 years and 9 months, and it will be 67 years and 3 months as of 2022. Assuming that his Belgian and the Dutch pensions are complementary and his Belgian pension is low, this person will more or less be forced to work until the AOW statutory retirement age. This is problematic because he will be legally discharged in Belgium at age 65.

Now imagine a similar cross-border worker who lives in Germany and works in the Netherlands. She will receive her German pension at 65 years and seven months in 2018, assuming, for the sake of simplicity, that the Dutch and German pensions that she has accrued are complementary. If her German pension is insufficient, she may decide to work part-time in the Netherlands until she has reached the AOW statutory retirement age. If this person works in Germany and has accrued both a Dutch and a German pension, she will receive her full German pension in 2018 at 65 years and seven months but will not be able to retire until age 68 in the Netherlands, i.e. in 2021. If her Dutch pension is insufficient, she will be forced to continue to work part-time in Germany. This is problematic, because she will be legally discharged in Germany at the retirement age of 65 years and 7 months.

The above examples illustrate the main problems that cross-border workers encounter when faced with different retirement ages across Member States. After the description of the objective and delineation of the research in Section 2, Section 3 will provide an analysis of the main cross-border impacts of the various legislations on retirement age per Member State. Section 4 addresses the complexity of the matter by categorically tracing the problems. Section 5 seeks to intensify the debate on how to improve the current legal regime and coordination between European social security law and international tax law, so as to create a more suitable legal regime for pensioners in the EU.

## **2. Research Objectives, Definitions, Themes and Indicators**

### **2.1 Effects today or in the future, objective: ex-post or ex-ante**

This dossier contains a (multidisciplinary) ex-ante/ex-post analysis of the cross-border impact of the differences in national legislations on retirement age in the Netherlands, Belgium and Germany. As

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<sup>85</sup> Example taken from: Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 267-268.



already noted, the pension field can be assessed from several perspectives: taxation, social security and pensions. The border impact assessment in this dossier requires a multidisciplinary analysis in order to obtain an overview of the cross-border effects that cross-border workers face as a result of the considerable differences in retirement ages across Member States.<sup>86</sup> One of the grounds for this multidisciplinary analysis is to potentially avoid the discoordination of the tax and social security levies. This multidisciplinary analysis therefore comprises an explanation of the main cross-border effects of the different retirement ages on taxation, social security and pensions. In addition, the analysis includes the relevant legislation at international (e.g. tax treaties), European (e.g. Regulation (EC) No. 883/2004) and national level (e.g. the legislation on retirement ages).

This dossier could not provide a quantitative analysis due to a lack of data on cross-border employment and pensions. Most of the figures on cross-border employment are somewhat dated and not fully representative, since the term 'cross-border worker' was left undefined or used in an inconsistent manner, making it unclear who fell within the definition. In addition, the data on cross-border employment have not been mapped in a coherent way, i.e. their reliability could be called into question, especially when encountering rounded numbers.<sup>87</sup>

For the same reason, i.e. the lack of adequate data collection, it is not possible either to analyse the effects on the sustainable economic development of border regions. As stated in last year's cross-border impact assessment, continuous and coherent monitoring of the cross-border activities of frontier workers is required to obtain a representative picture of the impact of new legislation on their situation. Coherence in the collection of these data will lead to more representative analyses, allowing us to perform a future review of cross-border mobility and, by extension, of the success of the European integration process. There is a great need for cross-border data to further explain the issue at hand and to determine its economic impact. Only then can the effects of (new) legislation on the sustainable economic development of the border regions and the business climate be quantitatively assessed.

In addition, this cross-border impact assessment compensates for a lack of cross-border impact assessment at legislative level by using a coherent tool, which will be explained below under 'Principles, Benchmarks and Indicators. The lack refers to the absence of a separate section that outlines the consequences of the new legislation for cross-border workers. In 2009 and 2012, for example, two motions were tabled requesting permanent attention for the problems of cross-border workers.<sup>88</sup> In 2015 a number of political parties repeated their desire to have the effects of legislative proposals on the border regions clarified during the legislative process, in the interest of performing a cross-border impact assessment.<sup>89</sup> Note that, during the parliamentary proceedings of the Dutch-

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<sup>86</sup> In line with recommendation 10 from the 'Grenswerkers in Europa' report. See Commissie grenswerkers, *Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken* (Geschriften van de Vereniging voor Belastingwetenschap, p. 314.

<sup>87</sup> See also the recommendation of the *Commissie grenswerkers, Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap no. 257, Vereniging voor Belastingwetenschap 2017, p. 34.

<sup>88</sup> *Kamerstukken II 2011/12, 33000 IXB* (motion by Bashir) and *Kamerstukken II 2009/10, 26 834, No. 26* (motion by Weekers) on the importance of paying attention to the problems of cross-border workers. See also Commissie grenswerkers, *Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap pp. 269-270.

<sup>89</sup> *Handelingen II 2014/15, nr. 50, p. 1-15* (Cross-Border Impact Assessment).

German tax treaty, a separate section on the impact on cross-border workers was added to the Explanatory Memorandum, resulting from the fact that a tax treaty naturally covers cross-border employment, among other things.<sup>90</sup> In national legislation, on the other hand, cross-border impacts are less prominent and therefore, unfortunately, underexposed in the legislative process. In this context, the motion tabled by Dutch MP Van der Molen is a positive development.<sup>91</sup> It rightly notes that various studies have shown that national policies often have unintended negative consequences for border regions and that the effects on these border regions are not necessarily being taken into consideration in the development of new policies. The petitioners therefore request an investigation of which legislative and regulative proposals might have disproportionate consequences for border regions, an investigation of the policy effects of several of these proposals, and, based on experience, inclusion of these effects on border regions in the IAK integral impact assessment framework for policy and legislation (hereafter: IAK).<sup>92</sup> We support the need for preventative examination of cross-border impact and inclusion of this impact in the IAK in an early stage of the legislative process.

## 2.2 The term 'cross-border worker'

The following should be noted with regard to the term 'cross-border worker': Dutch parliamentary documents often use the term 'grensarbeiders'.<sup>93</sup> It is unclear whether this includes employment as well as self-employment. This analysis uses the term 'cross-border workers' to designate 'employees', i.e. persons who are employed rather than self-employed.

In addition, the term 'cross-border worker' is meant to include active migrant workers, active cross-border workers and active seconded workers. The term 'non-active cross-border worker', on the other hand, includes retired cross-border workers.

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<sup>90</sup> *Kamerstukken II* 2013/14, 33 615, nr. 3 (MvT), section I.4 Grensarbeiders (on cross-border workers). The inclusion of this paragraph reflects the commitment made by former Secretary of State for Finance De Jager to explicitly include the consideration of the consequences for frontier workers in new legislation (see the Cabinet's Opinion on the recommendations by the Frontier Worker Commission, 9 January 2009, 2008/2455 BCPP with reference to *Kamerstukken II* 2000/01, 26 834, No. 5).

<sup>91</sup> *Kamerstukken II* 2017/18, 32 851, No. 48 (Modified motion by MP Van der Molen to replace No. 46). Accessible via <https://zoek.officielebekendmakingen.nl/https://www.tweedekamer.nl/kamerstukken/moties/detail?id=2018Z10410&did=2018D32053>.

<sup>92</sup> The *Integraal Afwegingskader – IAK* (integral impact assessment framework for policy and legislation) is used as a frame of reference for new laws and regulations. Cross-border effects as such are not included in this framework. See <https://www.kcwj.nl/kennisbank/integraal-afwegingskader-beleid-en-regelgeving>.

<sup>93</sup> See for example: *Kamerstukken II* 2013/14, 33 615, No. 3 (MvT), section I.4 Grensarbeiders (on cross-border workers). Please refer to the document *Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, par. 1.3.

## 2.3 Geographical area affected and definition of the ‘border region’

(Non-active) cross-border workers in the border regions between Belgium, Germany and The Netherlands are faced with the cross-border effects of the disparities between the various schemes regarding the retirement age for both statutory and supplementary pensions. More specifically, those affected are cross-border workers who live and work within a certain distance from the national borders. This report focuses on the relevant political entities, such as the Dutch municipalities, German *Landkreise* or Belgian *Arondissementen* to identify this group.

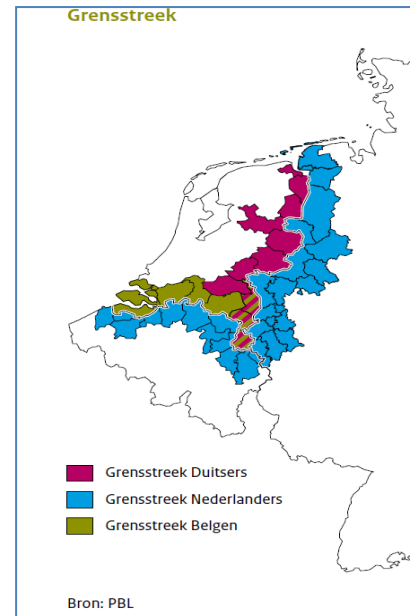


Figure 2: The border region<sup>94</sup>

## 2.4 Cross-border impacts: what are the research themes, principles, benchmarks and indicators?

Having defined the underlying problem, i.e. the different retirement ages; the border region; and the term 'cross-border worker' in the previous sections, the sections below provide a description of the research themes of this dossier. Based on the theme of 'European integration', different principles, benchmarks and indicators were selected that can help determine the cross-border effects of having different retirement ages across EU Member States.

### 2.4.1 The research themes of the dossier

This dossier focuses on the theme of 'European integration', more specifically the free movement of active and non-active cross-border workers, i.e. of labour and persons. Using the ITEM Cross-border Impact Assessment method, this report compares the indicators with the benchmarks. It identifies the levels of tax and social security levies (i.e. an indicator), for example, for multiple-state pensioners, i.e. people with pensions accrued in several (usually two) Member States, and compares them with those for domestic pensioners. This can help establish to what extent the benchmark of an open labour market with good coordination of social security and taxation levies has been achieved. In addition, a comparison of the treatment of a passive cross-border worker and a passive domestic worker in terms of the tax and social security levy will serve to determine the extent to which equality among neighbours (equality in the street) and equality among colleagues (equality in the work state) are guaranteed. These equalities emanate from the free movement of workers, as laid down in art. 45 TFEU, which prohibits the discriminatory treatment of active cross-border workers.

<sup>94</sup> Based on PBL (Netherlands Environmental Assessment Agency), *Arbeidsmarkt zonder grenzen*, Den Haag: PBL 2015, p. 48.

### 2.4.2 Dossier 3: What are the principles, benchmarks and indicators for achieving a positive situation in the border regions?

Following the descriptions in the previous section, the principles, benchmarks and method of examination can be represented schematically as follows in this report:

Principles	Benchmarks	Method	Indicator
European integration; non-discrimination	Open labour market; good coordination of social security and tax levies	Coordination of tax and social security levies through bilateral treaties and European regulations, respectively.	Cumulation of taxation and social security levies
<b><i>The free movement of labour pursuant to Article 21 TFEU in conjunction with Directive 2004/38/EC on the right of Union citizens and their family members to move and reside freely within the territories of the Member States, OJ.L. 29 June 2004, [...] 229, 35.</i></b> No discriminatory treatment of passive cross-border workers	Equality among neighbours (equality in the street)	Comparison between passive cross-border workers and passive domestic workers in terms of taxation, social security and pensions	Adverse treatment of non-active cross-border workers compared to non-active domestic workers
<b><i>The free movement of labour pursuant to Article 45 TFEU: no discriminatory fiscal treatment of active cross-border workers.</i></b>	Equality among neighbours (equality in the street)  Equality among colleagues (equality in the workplace)	Comparison between active cross-border workers and active domestic workers in terms of taxation, social security and pensions	Adverse treatment active cross-border workers compared to active domestic workers
<b><i>Bilateral tax treaties NL-BE-DE Article 24 tax treaty NL-DE and art. 26 tax treaty NL-BE (identical wording)</i></b>	No economic double taxation <sup>95</sup>  Non-discrimination	Comparison between (passive) cross-border workers and (passive) domestic workers in terms of taxation	Adverse fiscal treatment of (non-) active cross-border workers in relation to (non-)active domestic workers

<sup>95</sup> Economic double taxation occurs when one or two authorities levy tax on one object belonging to two natural persons or bodies or when one or two authorities levy tax twice on formally different yet materially identical objects belonging to one person.'

The above assessment framework serves as a starting point for the cross-border impact assessment of the schemes relating to retirement ages in the Netherlands, Belgium and Germany. The indicators will enable us to draw conclusions on the cross-border effects of these national legislations.

### 3. Overview of retirement ages NL/ BE/ DE

Before discussing the analysis of the impact of the disparities between the national schemes regarding retirement age, we will provide an overview of the retirement ages for both the statutory and supplementary pensions per Member State. This will clarify the pension ages faced by cross-border workers who have worked in these Member States.

There is no standard retirement age within the European Union.<sup>96</sup> In addition, there is no coordination of the various schemes regarding retirement age between the European Member States. For cross-border workers, this means that there is no one moment when their pension starts, as it consists of the various pensions accrued in each of their (former) work states. Due to these differences in retirement age, the start date of a cross-border worker's full retirement is determined by the Member State with the highest retirement age. A study of the retirement ages in Belgium, The Netherlands and Germany shows that they vary across Member States. *Below is an overview of the national retirement ages per Member State in 2018 for both the statutory and the supplementary pensions. These ages differ significantly between the three Member States, potentially causing cross-border effects.*

2018	Statutory retirement age	Retirement age for supplementary pensions	Flexibilisation options
Belgium	<i>Rustpensioen:</i> age 65 (until 2024); age 66 <sup>97</sup> as of 2025; age 67 <sup>98</sup> as of 2030	<ul style="list-style-type: none"> <li>- From the moment the statutory pension becomes effective;</li> <li>- Exception: worker who continues working after the statutory retirement age or the age at which the conditions for early retirement are met (must be expressly included in the pension regulations). In these cases, workers can also</li> </ul>	<i>Rustpensioen:</i> Early retirement <sup>99</sup> : a career of at least 41 years at age 62.5 <i>Supplementary pension:</i> None

<sup>96</sup> Let alone whether this would be desirable or even possible at European level.

<sup>97</sup> Those affected by the legislative amendment were born in or after 1960.

<sup>98</sup> Wet van 10 augustus 2015 tot verhoging van de wettelijke leeftijd voor het rustpensioen en tot wijziging van de voorwaarden voor de toegang tot het vervroegd pensioen en de minimumleeftijd van het overlevingspensioen, *BS* 21 augustus 2015.

<sup>99</sup> Statutory retirement before the statutory retirement age.

		request payment of their supplementary pensions, even if they aren't retiring yet.	
<b>Netherlands</b>	age 66 <sup>100</sup>	age 68 <sup>101</sup>	<i>Statutory pension:</i> None <i>Supplementary pension rights:</i> <b>Earlier start date:</b> possible in combination with actuarial lowering of the pension amount. <sup>102</sup> <b>Later start date:</b> possible in combination with actuarial increase in the pension amount. <sup>103</sup> Maximised at 5 years after reaching AOW retirement age. <sup>104</sup>
<b>Germany</b>	<i>Regelaltersrente:</i> Born before 1 January 1947: age 65 <sup>105</sup> Born after 31 December 1946 but before January 1964: a gradual increase of the age	The supplementary pension schemes, the most common of which are <i>Direktzusage</i> , <i>Direkt Versicherung</i> , <i>Support Checkout</i> , <i>Pensionskasse</i> , <i>Pensionsfonds</i> , cannot disburse before the pensioner reaches the	<i>Regelaltersrente:</i> Flexi-Rente <sup>109</sup> All insured persons have the option to take a partial pension. <sup>110</sup> Certain categories of insured persons can apply for early <i>Regelaltersrente</i> against a lifelong reduction. <sup>111</sup> <i>Supplementary pension:</i> none

<sup>100</sup> Ex. art. 7a(1) g Algemene Ouderdomswet (AOW - General Old Age Pensions Act): 'De pensioengerechtigde leeftijd in 2018: 66 jaar' ('Retirement age in 2018: 66 years'). The AOW retirement age will increase further according to a formula laid down in paragraph 2 of this Article. It will increase incrementally to 67 years in 2021 .

<sup>101</sup> Ex. art. 18a(6) Wet LB 1964 (Income Tax Act of 1964). Note that, even after 1 January 2018, pension schemes can still include a target retirement age lower than 68, provided that the size of the old age pension to be accrued does not exceed the fiscally maximum old age pension starting on the first day of the month when the age of 68 is reached and as recalculated for the lower target retirement age on the basis of generally accepted actuarial principles. See Vraag & Antwoord 17-012 d.d. 100118 (Pensioenrichtleeftijd lager dan 68 jaar vanaf 1 januari 2018), accessible via [https://www.belastingdienstpensioensite.nl/VA\\_17-012\\_v180110.htm](https://www.belastingdienstpensioensite.nl/VA_17-012_v180110.htm).

<sup>102</sup> Ex. 18a(6) Wet LB 1964 (Income Tax Act 1964).

<sup>103</sup> Ex. art. 18a(5) Wet LB 1964 (Income Tax Act 1964).

<sup>104</sup> Ex. art. 18a(4) Wet LB 1964 (Income Tax Act 1964).

<sup>105</sup> Under transitional law as laid down in Section 235, paragraph 2 SGB VI. Some categories have a lower retirement age; see Section 37 SGB VI for the severely disabled (65 years), Section 38 SGB VI for particularly long-term insured persons (65 years) and Section 40 SGB VI for miners (62 years). The *Deutsche Rentenversicherung* pension fund has developed a tool to calculate the legal retirement age: [https://www.deutsche-rentenversicherung.de/Allgemein/de/Navigation/5\\_Services/02\\_online\\_dienste/03\\_online\\_rechner\\_nutzen/rentenbeginn\\_hoehenrechner/Rentenbeginnrechner\\_node.html](https://www.deutsche-rentenversicherung.de/Allgemein/de/Navigation/5_Services/02_online_dienste/03_online_rechner_nutzen/rentenbeginn_hoehenrechner/Rentenbeginnrechner_node.html).

<sup>109</sup> Gesetz zur Flexibilisierung des Übergangs vom Erwerbsleben in den Ruhestand und zur Stärkung von Prävention und Rehabilitation im Erwerbsleben“ (Flexirentengesetz). See also [https://www.deutsche-rentenversicherung.de/Allgemein/de/Navigation/5\\_Services/01\\_kontakt\\_und\\_beratung/02\\_beratung/03\\_haeufige\\_fragen/12\\_flexirente\\_node.html](https://www.deutsche-rentenversicherung.de/Allgemein/de/Navigation/5_Services/01_kontakt_und_beratung/02_beratung/03_haeufige_fragen/12_flexirente_node.html). This measure enables partial early retirement - between 63 and 67 years - or to continue working after reaching the retirement age. For a comprehensive account of the *Flexi-Rente*, see: [https://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/5\\_Services/03\\_broschueren\\_und\\_mehr/01\\_broschueren/01\\_national/flexirente\\_das\\_ist\\_neu\\_fuer\\_sie.pdf?\\_blob=publicationFile&v=17](https://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/5_Services/03_broschueren_und_mehr/01_broschueren/01_national/flexirente_das_ist_neu_fuer_sie.pdf?_blob=publicationFile&v=17).

<sup>110</sup> Ex. Section 42 SGB VI.

<sup>111</sup> Ex. Section 36 SGB VI for long-term insured persons (from 63 years), § 37 SGB VI for the severely disabled (from 62 years).

	limit from 65 to 67 years <sup>106</sup> Born after July 1964: age 67 <sup>107</sup>	age of 62 years if the pension entitlements were granted after 1 January 2012. <sup>108</sup> Pension entitlements granted before 31 December 2011 are payable from the age of 60 years.	
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## 4. Most urgent problems due to disparities between retirement ages

### 4.1 Pension incompleteness and pension adequacy

Cross-border workers have typically worked in several Member States. One of the main implications of this is the fragmentation of their pension entitlements. A cross-border worker, for example, who has worked in the Netherlands, Belgium and Germany, has accrued pension entitlements in each of these Member States according to different national pension schemes. Due to the differences in retirement age between the Member States, cross-border workers are faced with a high administrative burden in their former work states and countries of origin, e.g. filling out two tax declarations. As tax subjects, they are exposed to great legal uncertainty about their net pension income because their social security levies are payable in one Member State and their taxes in another.

Cross-border workers who receive retirement pensions from several Member States - in this report: from NL/BE/DE - and at different start dates, may wonder when they will ever have a full pension, with 'full' meaning: composed of the various pensions from the different Member States. Cross-border workers depend on the Member State with the highest retirement age for receiving a full pension. The table above shows that this is the Netherlands. The disparities in retirement age imply that cross-border workers who have accrued a statutory pension in the Netherlands and in Belgium and/or Germany will have to wait a bit longer for their AOW benefits when they start receiving their foreign statutory pensions. The different start dates and forced wait for their AOW pensions can affect the net disposable income of the pensioners negatively.<sup>112</sup> In addition, it should be noted that this problem is made even more complex by the overlap of statutory and supplementary pensions and the related (im)possibilities to achieve flexibility. The above table shows that the supplementary pension age may differ from the statutory retirement age.

The unemployed cross-border workers mentioned earlier may get caught between ship and shore due to the differences in retirement age between the Member States and (partly) due to the absence of a common EU retirement age (insofar as attainable)<sup>113</sup>, effectively leaving cross-border workers without income for a period of time. The disparities between the different retirement ages can thus lead to

<sup>106</sup> Ex. Section 235, par. 2 SGB VI.

<sup>107</sup> Ex. Section 35 SGB VI.

<sup>108</sup> Ex. Section 1, par. 2, sub 2 AltZertG.

<sup>112</sup> For examples, please refer to the ITEM Cross-border Impact Assessment 2016, Dossier 7 on the *Wet Flexibilisering ingangsdatum AOW* (Flexible AOW Start Date Act):

[https://www.maastrichtuniversity.nl/sites/default/files/nl\\_item\\_grenseffectenrapportage\\_2016\\_versie\\_2.1.pdf](https://www.maastrichtuniversity.nl/sites/default/files/nl_item_grenseffectenrapportage_2016_versie_2.1.pdf).

<sup>113</sup> It is unlikely, after all, that there will ever be EU pension legislation.

incomplete pensions.<sup>114</sup> Cross-border workers in Belgium, for example, who have already retired and were previously insured in the Netherlands will receive incomplete pensions until they reach the pensionable age in the Netherlands. Whether they can maintain their standard of living on this Belgian pension alone depends on their individual income situations. In some individual cases, however, it is conceivable that the temporary lack of a full pension - while waiting for the Dutch pension - leads to situations in which retired cross-border workers are unable to maintain their standard of living. In such situations, a partial pension may be an inadequate pension, even though the provision of an adequate pension income for EU citizens is a present and future EU priority.<sup>115</sup> An inadequate pension generally refers to a retirement provision that does not allow pensioners to maintain their standard of living after retirement. An estimated 2,000 former cross-border workers are in this position.<sup>116</sup>

Alongside this fragmentation of pension entitlements across their various former or present work states, cross-border workers lack an overview of their statutory and supplementary pensions. Cross-border workers initially have no insight into the different retirement ages per pension, per Member State. It is up to each Member State whether or not to offer this insight into the present state of people's pensions. Cross-border workers find it difficult to discover which retirement ages apply to them, which may leave them in the dark as to when they can start taking their pension.

In addition, cross-border workers, lacking the full overview, are unable to judge whether their pension will be sufficient to maintain their standards of living after retirement. Moreover, they are not in a position to judge whether working longer or saving extra for retirement are necessary to ensure an adequate income after retirement.<sup>117</sup> As tax subjects, they are exposed to great legal uncertainty about their net pension incomes because their social security levies are payable in one Member State and their taxes in another. This is why a cross-border or European pension register is necessary: to allow cross-border workers to obtain a clear and accurate overview of their cross-border pension accruals, to offer them an action perspective<sup>118</sup> and to secure adequate incomes for these cross-border workers after retirement. This pension register would show cross-border workers which pensions are due from whom and when.<sup>119</sup> Since the retirement age differs across the EU, this would provide cross-border workers with an overview of retirement ages per receivable pension scheme.

Such a pension register would be a positive impulse for the labour mobility of workers. The EC already stressed the relevance of a European pension register in its Green Paper on Pensions, acknowledging the importance of the development and implementation of this type of information provision.<sup>120</sup> In this context, the TTYPE consortium launched 'Track and Trace your pension in Europe', an attempt to create one large European Tracking Service (ETS) in which all the Member States participate.<sup>121</sup> The

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<sup>114</sup> Providing an adequate pension income for EU citizens now and in the future is a priority for the European Union. See European Commission, Green Paper: Towards adequate, sustainable and safe European pension systems, COM(2010)365, p. 2.

<sup>115</sup> See European Commission, Green Paper: Towards adequate, sustainable and safe European pension systems, COM(2010)365, p. 2. It is generally difficult to establish, moreover, what constitutes a quantitatively adequate pension. An adequate level depends on the pensioner's personal situation, including the standard of living, and other sources of income, such as income from a personal pension product or from assets. In addition, the pension levels accrued within each pension scheme vary so strongly across Member States that it is generally difficult to determine an adequate level.

<sup>116</sup> <https://www.maastrichtuniversity.nl/nl/blog/2017/10/het-belang-van-een-flexibele-aow-ingangsdatum>

<sup>117</sup> See European Commission, Green Paper: Towards adequate, sustainable and safe European pension systems, COM(2010)365, p. 12. Once again confirmed by EC in European Commission White Paper: an agenda for adequate, safe and sustainable pensions, COM(2012)55, p. 14.

<sup>118</sup> The term 'action perspective' refers to the ability to assess whether there are any gaps in the accrual of pension rights and whether working longer or saving extra for retirement is necessary to ensure an adequate income after retirement.

<sup>119</sup> A. Bollen, 'Grensoverschrijdende fiscale organisatie van pensioenen', 2016, p. 25, accessible via: [https://cris.maastrichtuniversity.nl/portal/files/7250276/CBS\\_12079\\_Oratieboekje\\_Anouk\\_Bollen\\_Single\\_page.pdf](https://cris.maastrichtuniversity.nl/portal/files/7250276/CBS_12079_Oratieboekje_Anouk_Bollen_Single_page.pdf).

<sup>120</sup> White Paper, An agenda for adequate, safe and sustainable pensions, COM(2012)55 final, par. 3.2.

<sup>121</sup> See also the final report of the TTYPE consortium: <http://ttype.eu/reports/>.



wide diversity in pension systems within the EU may be a reason to consider such a European pension register on a smaller scale, e.g. between the Netherlands, Belgium and Germany.<sup>122</sup>

#### **4.2 Multiple-state pensioners: a shift in allocation rules**

The differences in the retirement age per Member State can cause undesirable situations in practice. A case in point are the multiple-state pensioners, i.e. those who receive pensions from two Member States. Given the disparities in retirement age across Member States, some time will elapse between pensioners' receiving their first and their second pension. As long as these cross-border workers receive only one pension, they qualify as 'single-state pensioners'. From the moment, however, that they start receiving their second pension, they qualify as multiple-state pensioners. This transition from single to multiple-state pensioner may be accompanied by a temporary transfer of authority in matters of social security. The legal situation of these cross-border workers in terms of taxation and social insurance thus changes as a result of the disparities in the retirement age. The issue of multiple-state pensioners in the Dutch-German and Dutch-Belgian border regions is explored below.

#### **Token entry: the tax and social security levies on pensions**

##### **The tax levy on pensions**

To ensure a proper understanding of the problems, the tax and social security levy regulations are briefly discussed first.

Taxation of cross-border pensions typically takes place through an exclusive levy in the state of residence.<sup>123</sup> The OECD Model Convention does not provide for statutory pensions, such as the Belgian *Rustpensioen*, the German *Regelaltersrente* and the Dutch AOW pension. These statutory pensions fall under other provisions, laid down in Article 21 of the OECD Model Convention, which arranges for exclusive taxation in the state of residence. As per Article 19 of the OECD Model Convention and following the Kass Tate principle, the taxation of the state pension is allocated to the state that provides the pension (hereafter: the 'pension state').

An increasing number of states are switching to source state levying when it comes to cross-border pensions. If social security contributions were charged to the taxable income in the past, the state that offers these social security services wishes to see a 'return' by taxation of the pension. This is true for the Netherlands-Belgium tax treaty of 2001, the Netherlands-Germany tax treaty of 2012 and the Netherlands-Portugal tax treaty of 1999. Striking is the inclusion of a source state levy above a certain amount: EUR 25,000 EUR 15,000 and EUR 10,000, respectively. Amounts below these limits are subject to a levy in the state of residence. It is not entirely clear why the amounts set out in the treaties differ.

##### **Social levy on pensions**

As regards the social security levies on pensions, Regulation (EC) No. 883/2004 stipulates that economically non-active pensioners are insured in their state of residence, where they pay

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<sup>122</sup> A. Bollen, 'Grensoverschrijdende fiscale organisatie van pensioenen', 2016, accessible via: [https://cris.maastrichtuniversity.nl/portal/files/7250276/CBS\\_12079\\_Oratieboekje\\_Anouk\\_Bollen\\_Single\\_page.pdf](https://cris.maastrichtuniversity.nl/portal/files/7250276/CBS_12079_Oratieboekje_Anouk_Bollen_Single_page.pdf).

<sup>123</sup> Article 18 of the OECD Model Convention.

contributions and are entitled to all medical benefits in kind and in cash (*lex loci domicilii*).<sup>124</sup> For the specific social security risk of illness, the EU legislator has opted for different allocation rules<sup>125</sup>, however, which take precedence over the general allocation rules.<sup>126</sup> Pensioners concerned only pay premiums or contributions in their pension state. A number of Member States offers these pensioners the right to seek medical treatment in their pension states (right of option).<sup>127</sup>

The decision which Member State, i.e. the pension state, is authorised to levy the costs and the healthcare contributions is made as follows:<sup>128</sup> pensioners who receive one or more pensions based on the legislations of two or more Member States, including the state of residence, and who are entitled to benefits under the legislation of the state of residence, must receive healthcare from the relevant institution of that Member State, i.e. health insurer/insurance, which must also bear the cost, as if the pensioner solely had a pension in that Member State.<sup>129</sup> Pensioners living in Belgium with pensions from both The Netherlands and Belgium are thus entitled to healthcare in Belgium.<sup>130</sup>

Pensioners who receive pensions from one or more Member States and are not entitled to healthcare under the legislation of their state of residence have the right to receive healthcare in their state of residence, provided that they would be entitled to this care in one or more of the Member States that provide their pensions if they resided there.<sup>131</sup> Those involved are therefore entitled to healthcare in the Member State of residence as if they had been entitled to a pension and healthcare under the legislation of that Member State. Article 24, paragraph 2 Regulation (EC) No. 883/2004 specifies the 'pension state' that must bear the costs. Where the pensioner is entitled to a pension in a single Member State, the cost of medical care in the pensioner's state of residence must be borne by the competent institution of that Member State. Where the pensioner is entitled to pensions in two or more Member States, other than the state of residence, the cost of medical care shall be borne by the competent institution of the Member State to whose legislation the person has been subject for the longest period of time. A pensioner with a Dutch and a German pension, for example, who resides in Belgium without receiving a Belgian pension is entitled to healthcare benefits in Belgium, even though this Member State is not the competent state. The competent state is the Member State where the pensioner (has) had social security insurance for the longest period of time (here: the Netherlands or Germany).

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<sup>124</sup> Article 11, paragraph 3, item e Regulation (EC) No. 883/2004.

<sup>125</sup> Art. 23 to 30 Regulation (EC) No. 883/2004.

<sup>126</sup> ECJ 14 October 2010, C-34 5/09, ECLI:EU:C:2010:610, *NTRFR2010/2443*, with notes by J.C.L.M. Fijen (*Van Delft et al.*).

<sup>127</sup> These Member States are listed in Annex IV to Regulation (EC) No. 883/2004.

<sup>128</sup> Note that Article 25 Regulation (EC) No. 883/2004 contains another special provision for pensioners who reside in a Member State where the right to healthcare benefits is not contingent on insurance or the performance of economic activities.

<sup>129</sup> Article 23 Regulation (EC) No. 883/2004.

<sup>130</sup> See also G. Essers and M. Weerepas, 'Grensoverschrijdende pensioenen: gebrek aan samenhang tussen fiscale en sociale heffingen', *TPV* 2017, 35.

<sup>131</sup> Article 24, paragraph 1 Regulation (EC) No. 883/2004.

#### 4.2.1. The Dutch-German border region: transfer of the tax levy over EUR 15,000

The Dutch-German tax treaty includes shared levying rights, despite Dutch efforts to achieve an unconditional source state levy on pensions accrued through tax facilitation<sup>132</sup>. In principle, (private) pensions are levied in the state of residence.<sup>133</sup> Note that pensions and other benefits paid under the provisions of a social security scheme established by the legislation of a Contracting State, i.e. social security pensions, are only taxable in the pension state.<sup>134</sup> The pension can also be levied in the source state, however, if the total gross amount in pensions or similar remunerations, annuities or social security pensions exceeds the sum of €15,000 in any calendar year. In these cases, the components of the pension already levied in Germany (as source state) are exempt from taxation in the Netherlands through a tax reduction, i.e. the settlement method.<sup>135</sup> This reduction is calculated in accordance with the provisions in the *Besluit voorkoming dubbele belasting 2001*, the Dutch legislation to avoid double taxation.

Due to these shared levying rights between the Netherlands and Germany, the fiscal levying of a pensioner who lives in The Netherlands with only a German pension will shift from The Netherlands to Germany as soon as the aggregate gross pension amount exceeds EUR 15,000. A possible explanation of these unwanted shifts in levying rights are the differences in subjective and objective scope of bilateral tax treaties and European Regulation 883/2004, as bilateral tax treaties pertain to the divisible incomes of persons and Regulation No. 883/2004 to indivisible insured persons.<sup>136</sup> These situations can be illustrated with a practical example.

#### Example

The effect of the discoordination can be illustrated through an example in the following table. A Dutch cross-border worker (born on 1 January 1952) worked in Germany for some time, then spent the rest of her working life in the Netherlands. While working in Germany, she accrued rights to a statutory pension from the *Gesetzlichen Rentenversicherung (Regelaltersrente)* and a supplementary pension from a *Pensionskasse*. The gross amount in joint German pensions is less than EUR 15,000. The *Regelaltersrente* from the *Gesetzlichen Rentenversicherung* has a retirement age of 65 years and 6 months.<sup>137</sup> This means that she has already been receiving this pension since 1 July 2017. She also chose the same start date for disbursement of her German *Pensionskasse* pension.<sup>138</sup> At that time, this cross-border worker qualified as a single-state pensioner, and the authority to tax the German pension was granted to the Netherlands.<sup>139</sup> The social security levy, on the other hand, was allocated to Germany.<sup>140</sup> Equal treatment in the state of residence is thus no longer guaranteed. This retired cross-border worker is treated adversely compared to retired domestic workers, i.e. those who chose not to work across the border. If this retired cross-border worker residing in The Netherlands solely received a German pension that exceeded EUR 15,000, the authority to tax would be transferred from The Netherlands to Germany. In this event, there would be no equal treatment in the state of residence (i.e. in the street), but there would be in the pension state (i.e. in the workplace: compared to former colleagues in Germany). This illustrates how the shared levy affects the extent to which non-active cross-border workers are treated equally with domestic non-active workers.

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<sup>132</sup> Note Tax Treaty Policy 2011, p. 54. 'Unconditional' refers to a source state levy that is independent of the fiscal treatment of pensions in the pensioner's (new) state of residence.

<sup>133</sup> Ex. art. 17(1) Tax Treaty Netherlands-Germany. Accessible via <http://wetten.overheid.nl/BWBV0005862/2016-12-31>.

<sup>134</sup> Ex. art. 17(1) Tax Treaty Netherlands-Germany.

<sup>135</sup> Ex. art. 22(2)(b), Tax Treaty Netherlands-Germany.

<sup>136</sup> G.J.C. Essers en M.J.G.A.M. Weerepas, 'Grensoverschrijdende pensioenen: gebrek aan samenhang tussen fiscale en sociale heffingen', *TPV* 2017/35, p. 16, footnote 33.

<sup>137</sup> Ex. Section 235 Tracks 2 SGB VI.

<sup>138</sup> Which is permitted pursuant to Section 1, para. 2, sub 2 AltZertG.

<sup>139</sup> Ex. art. 17(1) Tax Treaty Netherlands-Germany.

<sup>140</sup> Ex. art. 24 Regulation 883/2004

When this cross-border worker reaches the AOW retirement age of 66 years, on 1 January 2018<sup>141</sup>, she will receive his Dutch statutory pension as well, including the option to also have any Dutch supplementary pensions disbursed on the same date<sup>142</sup>. This would, however, lead to the actuarial adjustment and lowering of the amount of supplementary pension. This constitutes the flexibility option for Dutch supplementary pensions, whereby this cross-border worker will receive a full pension on 1 January 2018 instead of having to wait until 2020, i.e. the year in which she reaches the age of 68 years. As of 1 January 2018, this retired cross-border worker will qualify as a multiple-state pensioner as she will be receiving a German and Dutch pension from that time. If the gross total German pension is less than EUR 15,000, the tax levy is allocated to the Netherlands as the state of residence.<sup>143</sup> In that case, the social security levy is allocated to Germany. The equal treatment of cross-border workers is thus not guaranteed, and nothing has changed compared to the situation of a single-state pensioner. If she receives a total German pension of more than EUR 15,000, however, the tax levy is shared between the Netherlands and Germany, while the Netherlands is authorised to levy the social security contributions. Even this situation does not lead to the equal treatment of cross-border workers. It has changed, however, compared to the situation of a single-state pensioner: in addition to the fact that the tax levy is now shared between the Netherlands and Germany, the social security levy has transferred from Germany to the Netherlands.<sup>144</sup> Where the single-state pensioner residing in the Netherlands with only a German pension of more than EUR 15,000 at least received equal treatment in the pension state, there is no equal treatment whatsoever for the double-pensioner residing in the Netherlands with a Dutch pension and a German pension of more than €15,000.

#### Application<sup>145</sup>

Living in The Netherlands with only a German pension greater or less than EUR 15,000			
Living in The Netherlands with only a German pension < EUR 15,000		Living in The Netherlands with only a German pension > EUR 15,000	
Tax Levy	Social Levy	Tax Levy	Social Levy
Netherlands	Germany	Germany	Germany
No equal treatment		No equal treatment in the state of residence; equal treatment in the pension state	

Living in Germany with only a Dutch pension greater or less than EUR 15,000			
Living in Germany with only a Dutch pension < EUR 15,000		Living in Germany with only a Dutch pension > EUR 15,000	
Tax Levy	Social Levy	Tax Levy	Social Levy
Germany	Netherlands	Netherlands	Netherlands
No equal treatment		No equal treatment in the state of residence; equal treatment in the pension state	

<sup>141</sup> Ex. art. 7a(1)(g) General Old Age Pensions Act: 'De pensioengerechtigde leeftijd in 2018: 66 jaar.' ('Retirement age in 2018: 66 years.')

<sup>142</sup> Ex. 18a(6) Wet LB 1964 (Income Tax Act 1964).

<sup>143</sup> Ex. art. 17(1) Tax Treaty Netherlands-Germany.

<sup>144</sup> Ex. art. 23 Regulation (EC) No. 883/2004,

<sup>145</sup> The content of these tables is based on Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 284 et seq. See also the table in G.J.C. Essers and M.J.G.A.M. Weerepas, 'Grensoverschrijdende pensioenen: gebrek aan samenhang tussen fiscale en sociale heffingen', *TPV* 2017/35, p. 16.

Living in The Netherlands with a German pension greater or less than EUR 15,000 and a Dutch pension			
Living in The Netherlands with a German pension < EUR 15,000 and a Dutch pension		Living in The Netherlands with a German pension > EUR 15,000 and a Dutch pension	
Tax Levy	Social Levy	Tax Levy	Social Levy
Netherlands	Germany	The Netherlands and Germany (shared levy)	Netherlands
No equal treatment		No equal treatment	

Living in Germany with a Dutch pension greater or less than EUR 15,000 and a German pension			
Living in Germany with a Dutch pension < EUR 15,000 and a German pension		Living in Germany with a Dutch pension > EUR 15,000 and a German pension	
Tax Levy	Social Levy	Tax Levy	Social Levy
Germany	Netherlands	The Netherlands and Germany (shared levy)	Germany
No equal treatment		No equal treatment	

#### 4.2.2. The Dutch-Belgian border region: shared tax levy > EUR 25,000

The Dutch-Belgian tax treaty provides for a shared levy, i.e. a source state levy subject to special provisions, despite Dutch efforts to achieve an unconditional source-state levy on pensions accrued through fiscal facilitation<sup>146</sup>. In principle, (private) pensions are levied in the state of residence.<sup>147</sup> Note that pensions and other benefits paid under the provisions of a social security scheme established by the legislation of a Contracting State (social security pensions) are only taxable in the state of residence.<sup>148</sup>

Pensions can also be taxed in the source state under certain (cumulative) conditions:<sup>149</sup> first of all, the pensions must have been subject to tax facilitation in the source state, i.e. tax exemption for pension entitlements, fiscal deduction of pension contributions or other means of tax facilitation.<sup>150</sup> Secondly, the pension must not be levied in the state of residence at the general tax rate for income from non-autonomous professions, nor must the levy involve less than 90% of the gross pension.<sup>151</sup> The final requirement is that the gross total pension per calendar year must exceed EUR 25,000.<sup>152</sup> In this event, the components of the pension already levied in Belgium (as source state) will be tax exempt in the Netherlands through a tax reduction under the settlement scheme.<sup>153</sup> This reduction is calculated in accordance with the provisions in the *Besluit voorkoming dubbele belasting 2001*, the Dutch legislation to avoid double taxation. To this end, the components mentioned shall be considered part of the income or asset components exempt from Dutch taxation under those provisions.

<sup>146</sup> Notitie Fiscaal Verdragsbeleid 2011, p. 54. 'Unconditional' refers to a source state levy that is independent of the fiscal treatment of pensions in the pensioner's (new) state of residence.

<sup>147</sup> Ex. art. 18 (1)(a), Belastingverdrag Nederland-België (Netherlands-Belgium Tax Treaty). Accessible via [https://download.belastingdienst.nl/belastingdienst/docs/verdrag\\_nl\\_be.pdf](https://download.belastingdienst.nl/belastingdienst/docs/verdrag_nl_be.pdf).

<sup>148</sup> Ex. art. 18(1)(b), Belastingverdrag Nederland-België (Tax Treaty Netherlands- Belgium).

<sup>149</sup> Ex. art. 18(2) Tax Treaty Netherlands- Belgium. Note that this source state levy subject to special provisions is in line with the Commentary on the OECD model convention, art. 18, par. 15 (d).

<sup>150</sup> Ex. art. 18 (2)(a), Belastingverdrag Nederland-België (Tax Treaty Netherlands-Belgium).

<sup>151</sup> Ex. art. 18(2)(b), Belastingverdrag Nederland-België (Tax Treaty Netherlands-Belgium).

<sup>152</sup> Ex. art. 18(2)(b), Belastingverdrag Nederland-België (Tax Treaty Netherlands-Belgium).

<sup>153</sup> Ex. art. 23(2)(b), Belastingverdrag Nederland-België (Tax Treaty Netherlands-Belgium).

This conditional source state levy has led to double taxation of cross-border workers in the recent past.<sup>154</sup> Because the Netherlands believed that pensions were being insufficiently levied in Belgium, it repealed all income tax exemptions for pensioners with a Dutch pension living in Belgium. This led to the double taxation of retired frontier workers. The Netherlands and Belgium have agreed, however, that the Netherlands will not levy any tax on pensions from the Netherlands if Belgium actually and sufficiently levies these pensions.<sup>155</sup> The Netherlands will be allowed to levy where this is not the case, and Belgium will refrain from double taxation. In addition, arrangements were made regarding the exchange of information between the Netherlands and Belgium, so that The Netherlands now knows the situations where pensions are actually and sufficiently levied in Belgium as well as those where they are not. These agreements help avoid situations of double taxation as well as of double non-taxation, which is the objective of tax treaties.<sup>156</sup>

### Example

The effect of this discoordination on the relationship between the Netherlands and Belgium can be illustrated by the following example: a (former) Dutch cross-border worker (born on 1 January 1952) worked in the Netherlands for some time, then spent the rest of his life working and residing in Belgium. When working in The Netherlands, he accrued statutory AOW pension and supplementary pension rights with an industry pension fund. The gross amount in joint Dutch pensions is less than EUR 15,000.

The Belgian statutory *Rustpensioen* has a retirement age of 65 years. This means that he has already been receiving this pension as of 1 January 2017, qualifying as a single-state pensioner since that time. The tax levy has been allocated to the Netherlands<sup>157</sup>, the social security levy to Belgium<sup>158</sup>. Equality in the state of residence is thus no longer guaranteed. When this cross-border worker reaches the AOW retirement age of 66 years, on 1 January 2018<sup>159</sup>, he will receive the Dutch statutory pension as well, with the option to have any Dutch supplementary pension also disbursed on that date<sup>160</sup>. This would, however, lead to an actuarial lowering of the supplementary pension, constituting a disproportionate reduction. This is a flexibility option for Dutch supplementary pensions, in that the cross-border worker will now receive a full pension on 1 January 2018 instead of having to wait until 2020, when he reaches the age of 68 years. The benefit of setting a single retirement date is offset by a certain reduction in the amount of the Dutch supplementary pension, which may jeopardise the adequacy of the full pension. In opting for a single retirement date, this cross-border worker qualifies

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<sup>154</sup> As already cited in the Note on tax treaty policy 2011, p. 54: *‘daarvoor is ook van belang dat inmiddels ervaring is opgedaan met de in de eerder genoemde ten tweede genoemde regeling (al dan niet gedeeltelijke, bronstaatheffing), waarbij de toewijzing van het heffingsrecht mede afhankelijk is van de fiscale behandeling van het pensioen in het woonland van de pensioengerechtigde en welke ervaring heeft geleerd dat het in de praktijk niet eenvoudig is inzicht te krijgen in de wijze van belastingheffing in bedoeld woonland.’*

(‘It is also important, in this context, that experience has meanwhile been gained with the scheme of full or partial source state tax, previously mentioned as the second scheme, whereby the allocation of the tax levy depends, among other things, on the fiscal treatment of the pension in the pensioner’s country of residence. This experience has shown that, in practice, it is not easy to gain insight in the procedure for levying tax in the relevant country of residence.’)

<sup>155</sup> This agreement can be accessed via <https://zoek.officielebekendmakingen.nl/stcrt-2018-17744>. See also the Letter to Parliament: <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/02/23/kamerbrief-afspraak-tussen-nederland-en-belgie-over-pensioenproblematiek>.

<sup>156</sup> See also the policy of the Dutch tax authorities:

<https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/berichten/nieuws/pensioengerechtigden-belgie-met-nederlands-pensioen-wijziging-ingetrokken-verdragsverklaringen>. See also the ITEM news release <https://www.maastrichtuniversity.nl/nl/nieuws/item-einde-aan-dubbele-belasting-van-pensioenen-grensarbeiders>.

<sup>157</sup> Ex. art. 18(1) Tax Treaty Netherlands-Belgium.

<sup>158</sup> The economically non-active (i.e. pensioners) are subject to the *lex loci domicilii* on the basis of art. 11, paragraph 3, item e, Regulation No. 883/2004.

<sup>159</sup> Ex. art. 7a(1), sub g Algemene Ouderdomswet (General Old Age Pensions Act): ‘De pensioengerechtigde leeftijd in 2018: 66 jaar.’ (‘Retirement age in 2018: 66 years.’)

<sup>160</sup> Ex. 18a(6) Wet LB 1964 (Income Tax Act 1964).

as a multiple-state pensioner as of 1 January 2018, as he now receives a Belgian and a Dutch pension. In such cases, the tax levy generally remains in the Netherlands.<sup>161</sup> The levy of social security contributions, however, transfers from Belgium to the Netherlands.<sup>162</sup> So far, this constitutes equality of treatment in the state of residence. Belgium can also levy, however, if the Dutch pension exceeds EUR 25,000 and the other terms and conditions of the conditional source state levy have been met. The Netherlands must then use the settlement scheme to prevent double taxation of the pension components already taxed in Belgium.<sup>163</sup> This situation is known as shared levying. It constitutes partial equal treatment in the state of residence, i.e. as to the social security levy (in the Netherlands) and the levy on the Dutch pension (in the Netherlands). The Belgian side of the tax levy, however, treats these retired cross-border workers adversely compared to retired domestic workers, i.e. those who chose not to work across the border. This illustrates how the shared levy affects the extent to which non-active cross-border workers are treated equally with domestic non-active workers.

#### Application<sup>164</sup>

Living in The Netherlands			
Living in The Netherlands with only a Belgian pension		Living in The Netherlands with a Dutch and a Belgian pension	
Tax Levy	Social Levy	Tax Levy	Social Levy
Netherlands	Belgium	Netherlands	Netherlands
No equal treatment		Equal treatment in the state of residence	

Living in Belgium			
Living in Belgium with only a Dutch pension		Living in Belgium with a Dutch and a Belgian pension	
Tax Levy	Social Levy	Tax Levy	Social Levy
Belgium	Netherlands	Belgium	Belgium
No equal treatment		Equal treatment in the state of residence	

#### 4.2.3. Preliminary conclusion

The lack of coherent coordination and the unequal treatment in the above situations are often painful; roughly half of the cases in these bilateral relations involve a discoordination between the tax and social security levies. The regime governed by the social security regulations and tax treaties is complex and often difficult to apply in practice. The relationship between social security contributions and pension levies may be skewed in a cross-border context. As a result, pensioners are often obliged to pay social security contributions in their pension state and taxes in their state of residence (sometimes even in several Member States). Pensioners may thus help finance healthcare in more than one Member State, constituting a double liability that is at odds with the freedom of movement.

<sup>161</sup> Ex. art. 18(1) Tax Treaty Netherlands-Belgium.

<sup>162</sup> Ex. art. 23 Regulation (EC) No. 883/2004, See also G.J.C. Essers and M.J.G.A.M. Weerepas, 'Grensoverschrijdende pensioenen: gebrek aan samenhang tussen fiscale en sociale heffingen', TPV 2017/35, p. 14.

<sup>163</sup> Ex. art. 18 (2) j<sup>o</sup> section 23(2)(b), Belastingverdrag Nederland-België (Tax Treaty Netherlands-Belgium).

<sup>164</sup> Contrary to the table on the NL-DE relationship, this table does not include the scenario of a shared levy between source state and state of residence - ex. art. 18(1) Tax Treaty Netherlands-Belgium. Contrary to the shared levy in the NL-DE tax treaty, the NL-BE tax treaty contains a conditional source state levy. This conditional source state levy is subject to the conditions identified above. It has not been included in this table as it only pertains to exceptional situations.

The tables above also show that there are only few cases where equal treatment in the state of residence can be guaranteed.<sup>165</sup> The discoordination of tax and social security levies may have advantages or disadvantages. A low tax levy in Member State X will often be accompanied by low social security contributions in Member State Y. The opposite is also likely to occur however. Double taxation may take place where healthcare is financed through taxation, such as in Spain. The section 'Towards potential solutions' below will address the question of how to solve this discoordination.

### **4.3. Early retirement issues**

In granting statutory pensions, each Member State must take into account periods of insurance in other Member States. As mentioned above, early retirement in Belgium, i.e. statutory retirement before the legal retirement age is linked to career-related conditions, for example. Following the principle of aggregation of time periods, the years of service in other Member States must be taken into account in verifying whether these career-related conditions have been met. The difficulty is that each Member State has its own national legislation to determine whether the conditions for early or statutory retirement have been met. Workers who are entitled to a statutory pension in the Netherlands or Germany, are not, by default, entitled to one in Belgium as well. If a worker opts to take her Dutch pension and stop working, this may postpone the option of her retiring in Belgium. Conversely, it will not make sense to apply for an early statutory pension in Belgium if having a foreign professional income leads to the suspension of that Belgian statutory pension for being in excess of the number of hours of work allowed after retirement. Cross-border workers would be wise to investigate whether they can retire in all Member States, and if not, to examine the impact of ceasing or continuing their professional activities when requesting a pension in one Member State.<sup>166</sup> It is difficult for cross-border workers to assess their situation, however, as they don't have a full overview of their pension status.

### **4.4. Discoordination of taxation and social security**

Cross-border workers who are nearing the end of their careers may be confronted with a discoordination between taxation and social security, a problem that has already been examined above from the perspective of multiple-state pensioners. The section below studies the discoordination between taxation and social security for: (i) working pensioners and (ii) healthcare contributions and taxation.

#### ***4.4.1. Application 1: Social security and tax levies on working pensioners***

People who are not carrying out any work activities are subject to the legislation of their state of residence.<sup>167</sup> Persons who receive cash benefits 'because of or as a consequence of' their activities must be regarded as people who are still employed.<sup>168</sup> Imagine a German resident who works in the Netherlands as a temporary worker and falls ill. He or she will receive Dutch UWV benefits and consequently remain insured in the Netherlands. Beneficiaries of benefits or pensions who decide to start working (part-time) in another Member State are subject to the rules laid down for workers. This implies that a person living in The Netherlands with a social benefit or an AOW old age pension who

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<sup>165</sup> Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 285.

<sup>166</sup> J. Beernaert, "Pensioenopbouw voor internationaal mobiele werknemers in de EER. Praktische tips & tricks", *OR* 2016, nr. 9, 262-274.

<sup>167</sup> Article 11, paragraph 3 Regulation (EC) No. 883/2004.

<sup>168</sup> Article 11, paragraph 2 Regulation (EC) No. 883/2004.



starts working (part-time) in Belgium or Germany is covered by social insurance in Belgium or Germany, regardless of the size of his or her job.

This working pensioner is no longer socially insured, however, but is subject to tax levies on his pension/benefit in his state of residence. This can have advantages as well as disadvantages.<sup>169</sup> These people are typically unaware that they have changed social systems,<sup>170</sup> a problem that can be solved through information provision and advice.<sup>171</sup> Optimisation and extension of the information provision by tax authorities and other organizations, such as the *GrensInfoPunten* (cross-border information points) and the *Grensoverschrijdend Werken en Ondernemen* team (a cross-border employment and entrepreneurship team) of the Tax Administration office in Maastricht, are generally recommended.<sup>172</sup> At the same time, (soon to be) pensioners also have a responsibility to collect information about their own pensions. The exception provided for in Article 16 Regulation (EC) No. 883/2004 may offer another solution (see below).

#### 4.4.2. Application 2: Levies on healthcare contributions and the taxation of pensioners

A large group of pensioners are entitled to medical care in their state of residence on the basis of their pensions and at the expense of another Member State: the pension state.<sup>173</sup> These cross-border workers pay healthcare contributions in their pension states in accordance with the laws and regulations of these states. Most of the tax treaties, however, allocate the taxation of statutory and/or supplementary occupational pensions to the state of residence. This discoordination between tax and social security levies may have adverse or beneficial effects. Pensioners who reside in a Member State where healthcare is financed through general funds are faced with economic double taxation. Some Member States finance their healthcare through general (tax) means, through tax and social levies or through a hybrid system.<sup>174</sup> This financing can be schematically expressed as follows:<sup>175</sup>

Pensioners	Social security contributions	Tax Levies	Hybrid levies
Illness	AT, CZ, CY, DE, EL, HR, LT, LV, PL, SI	DK, EE, IE, IT, PT, ES, UK	BE, BG, FI, FR, HU, LI, LU, MT, NL, RO, SE, CH
Long-term care	DE, EL, HR	AT, CY, DK, FI, FR, HU, LT, LV, PT, SE, ES	BE, BG, CZ, IE, LI, LU, MT, NL, PL, SI, CH

<sup>169</sup> Those involved may voluntarily take out AOW/Anw insurance for another ten years.

<sup>170</sup> ECJ 23 April 2013, Case C-382/13, *Franzen*, ECLI:EU:C:2015:261, RSV 2015/249, with notes by F.W.M. Keunen, *BNB* 2015/138, with notes by P. Kavelaars, *NTR* 2015/1564, with notes by J.C.L.M. Fijen.

<sup>171</sup> Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 223.

<sup>172</sup> [https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/standaard\\_functies/privé/contact/belastingtelefoon\\_bellen/team\\_grensoverschrijdend\\_werken\\_en\\_ondernemen\\_gwo](https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/standaard_functies/privé/contact/belastingtelefoon_bellen/team_grensoverschrijdend_werken_en_ondernemen_gwo); <https://grenzinfo.eu/nl/>.

<sup>173</sup> Sickness benefits for pensioners and members of their families. See Articles 23 to 35 of Regulation (EC) No. 883/2004,

<sup>174</sup> B. Spiegel (ed), K. Daxkobler, G. Strban & A.P. van der Mei, Analytical report 2014: The relationship between social security coordination and taxation law, FreSsco, European Commission, January 2015.

<sup>175</sup> Table based on the Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 228.

The fact that healthcare is partly or fully financed through general means in a number of Member States causes positive or negative legal conflicts in cross-border situations where a pensioner pays social security contributions in one state and is simultaneously taxed in another state. This problem can be resolved unilaterally if a state of residence offers a discount on its taxes, for example. The discount rate may equal the tax component used to fund healthcare in the state of residence. In addition, individual solutions may be reached to achieve equality in the street. By working (part-time), pensioners can shift the insurance obligation to the country of residence, where they work. Social security is subject to the country-of-work principle.

#### **4.5. A concrete problem among unemployed Belgians in the Dutch-Belgian context**

By opting for the free movement of people and working in a neighbouring country, a choice in some cases encouraged by the European policy of cross-border cooperation, unemployed residents of Belgium will find themselves disadvantaged for the rest of their lives at the end of their careers. The national legislations ensure, in principle, that the transition from the system of social benefits to the system of pensions is seamless. This smooth transition is less self-evident, however, when, due to the application of the European coordination rules, pensions are payable by a country other than the country that used to provide the social security benefits.

There is a lack of continuity in the protection of the social rights of cross-border workers who live in Belgium, have a long employment history in the Netherlands and become unemployed after the age of 65.

#### **Example**

Imagine a Belgian resident who works in the Netherlands. He is 60 years old and has been unemployed for 2 years. He receives unemployment benefits from the Belgian National Employment Office (RVA). His entitlement to unemployment benefits ends when the claimant reaches the age of 65 years, the Belgian retirement age.<sup>176</sup> At that time he will be expected to apply for his Belgian pension. Since he worked in the Netherlands for his entire career, however, his entitlement to a Belgian pension is very limited. He has to wait until he reaches the Dutch retirement age (of 66 years; to be increased to 67 years in 2021) to receive a pension for his work activities in the Netherlands, meaning that he will receive no Dutch pension until that time. Meanwhile, his Belgian pension is (too) low due to a (too) short career in Belgium. This person will not be entitled to any social benefits between age 65 and 66 (to be increased to 67 in 2021), meaning that he will receive no social benefits and hardly any pension.<sup>177</sup>

Before 1 January 2015, the Belgian pension scheme for workers was virtually the only one in the EU that provided for the calculation of a (supplementary) pension for cross-border workers.<sup>178</sup> This is a Belgian pension benefit based on periods of foreign employment that is being phased out. In addition to the pension of the country where they worked (in the above case: The Netherlands), these cross-

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<sup>176</sup> Article 64 of the Royal Decree (KB) of 25 November 1991 on unemployment regulations.

<sup>177</sup> Example based on Annual Report 2016, the Federal Ombudsman, 'De continuïteit van sociale rechten van grensarbeiders' (aanbeveling AA 16/01 aan het Parlement), pp. 27-28. Accessible via: [https://1070.makemeweb.net/sites/default/files/explorer/RG-AA-1601\\_-\\_frontaliers\\_-\\_grensarbeiders.pdf](https://1070.makemeweb.net/sites/default/files/explorer/RG-AA-1601_-_frontaliers_-_grensarbeiders.pdf), p. 27-28.

<sup>178</sup> The complement has since only been granted under the old scheme to those who (i) had spells as a cross-border worker before 2015 and (ii) reached the age of 65 years before 1 December 2015 (or satisfied the conditions for an early retirement at that time). Those who did not meet the age condition in 2015 but did spend career years as a frontier worker before 2015 are since only granted the supplement when (iii) they have reached the foreign statutory retirement age and (iv) the foreign pension is payable.

border workers receive a supplementary Belgian pension for the time that they had worked abroad. Until the *Programmawet* (Programme Act) of 19 December 2014, cross-border workers were entitled to the Belgian supplementary pension when they reached the Belgian retirement age. Under the current system, however, the entitlement to the Belgian supplement starts on the date when the foreign pension becomes payable. As a result of the dismantling of this pension supplement, these workers are now at risk of finding themselves in a social-legal vacuum. In the event of unemployment and (long-term) disease, they are typically not entitled to a replacement income in their work states but depend on a benefit at the expense of the Belgian social security system instead. The unemployment, disability and invalidity schemes in Belgium only cover workers up to the age of 65 years. Because Belgium's neighbours have higher retirement ages, these workers cannot claim their foreign pensions yet. While it is true that they can already claim a pension in Belgium for having reached the statutory retirement age, they are nevertheless faced with pensions that are too low due to limited careers in Belgium and the lack of a compensation scheme in the form of the pension supplement.<sup>179</sup>

Europe only coordinates the social security systems of the Member States and does not exclude differences between these systems. Precisely these differences may lead to gaps in social protection. From a European point of view, it might be further noted that the European coordination rules dictate that pensions are payable on the basis of the rights accrued in the country of work and the minimum age applicable there. Unemployment benefits are paid by the worker's country of residence. An uncoordinated increase in the retirement age leads to application problems in this context. If the Member States concerned have applied the European rules correctly, however, and have made appropriate use of their freedom to set their own national rules, it is much less clear who is responsible for finding a solution.

The Belgian ombudsman for pensions, the German Federal Ombudsman and the Dutch National Ombudsman are demanding a swift solution for the issue<sup>180</sup>, which currently affects 2,900 cross-border workers and will affect 4,400 by 2020.

On 5 July 2017, a legislative proposal was put forward to strengthen the social protection of cross-border workers.<sup>181</sup> The proposal consists of changing the unemployment regulations and the law on compulsory sickness and invalidity insurance to the effect that former cross-border workers would continue to enjoy the benefits payable by the Belgian social security system until they reach the statutory retirement age of the neighbouring country where they were employed.

## 5. Towards potential solutions

The above-mentioned problems caused by the existence of different retirement ages between the Member States, beg the question whether, and if so, how the existing regime can be simplified and adjusted so as to do more justice to the interests of cross-border workers. A number of viable options are considered below. The idea is not to flesh out each of these options in detail or launch a proposal for the 'perfect' solution, but rather to spark a debate for the sake of progress.

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<sup>179</sup> Opinion of 2018, issued at the request of the Belgian Minister of the Self-Employed: 'Versterking van de sociale bescherming van grensarbeiders', 2 March 2018. See:

[http://www.rsvz.be/sites/rsvz.be/files/publication/algemeen\\_beheerscomite\\_advies\\_201806.pdf](http://www.rsvz.be/sites/rsvz.be/files/publication/algemeen_beheerscomite_advies_201806.pdf).

<sup>180</sup> <http://www.ombudsmanpensioen.be/docs/reports/2016/JV%202016%20deel%20I.pdf>.

<sup>181</sup> Wetsvoorstel tot versterking van de sociale bescherming van grensarbeiders, Parl. St., Kamer, 2016-2017, 5 juli 2017, nr. 2597/001. See also: [http://www.rsvz.be/sites/rsvz.be/files/publication/algemeen\\_beheerscomite\\_advies\\_201806.pdf](http://www.rsvz.be/sites/rsvz.be/files/publication/algemeen_beheerscomite_advies_201806.pdf).

## 5.1 Flexibilisation of the retirement age

### 5.1.1 A further increase of the AOW retirement age?

The further increase of the AOW retirement age follows the formula outlined in paragraph 2 of art. 7a AOW. This age is gradually being increased to 67 years in 2021<sup>182</sup> and will be made contingent on life expectancy as of 2021. Based on the current criteria, the AOW retirement age will be 67 years and 3 months in 2022. This age will remain the same for 2023 as life expectancy is increasing at a slower pace. This means that cross-border workers will have to wait for their full pensions even longer.

Also note that the link between AOW retirement age and the target age for receiving supplementary pensions has been severed since 2013. Any legislation until 2013 had been based on pensions becoming effective at the age of 65. To motivate these decisions, the legislator had always used the argument of consistency with the AOW retirement age.<sup>183</sup> This link was severed with the introduction of the *Wet verhoging AOW- en pensioenrichtleeftijd* (Increased target age for AOW and Other Pensions Act),<sup>184</sup> so that the AOW retirement age and the target retirement age for supplementary pensions have increasingly been diverging since 2013.<sup>185</sup>

The target age for supplementary pensions was increased to 68 years on 1 January 2018.<sup>186</sup> At the introduction of this increased pension target age, again, no attention was paid to its cross-border impacts.<sup>187</sup> Also note that the effective retirement age of workers rose by 5 months between 2016 and 2017,<sup>188</sup> putting the average retirement age for workers at 64 years and 10 months in 2017.

From a cross-border perspective, it is desirable that the AOW retirement age does not continue to rise, as this further increases the differences with the retirement ages in Belgium and Germany, with all the adverse consequences associated for cross-border workers. A recent statement said that the AOW retirement age could be increased at a slower pace, since remaining life expectancy at 65 had risen slower than previously assumed.<sup>189</sup> Figures from Statistics Netherlands (CBS) show that the Dutch who will be 65 in 2023 are expected to live for another 20.48 years. Last year, their life expectancy was still estimated at 20.74 years. Based on this new forecast of remaining life expectancy of those

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<sup>182</sup> Dutch Social insurance bank SVB has developed a tool that residents can use to calculate their projected AOW age based on their year of birth.

<sup>183</sup> Wet fiscale behandeling van pensioenen, *Kamerstukken II* 1997/98, 26 020, No. 3, p. 24.

<sup>184</sup> Increase of AOW retirement age and target retirement age for supplementary pensions, *Kamerstukken II* 2011/12, 33 290. Where the AOW age increase takes place in increments of one or three months, the target age for supplementary pensions increases by one full year per step. This is due to the fact that adjustment of the fiscal target age for pensions does not affect already accrued entitlements, so that a more gradual increase in the AOW retirement age is not required to achieve a gradual increase in the actual retirement age.

<sup>185</sup> See also E.A.P. Schouten, 'Ingangsdata AOW en pensioen lopen straks uiteen', *Pensioen & Praktijk* 2012/10.

<sup>186</sup> See Decision of 21 December 2016 amending certain laws and implementing decisions concerning taxes, accessible via <https://zoek.officielebekendmakingen.nl/stb-2016-549.html>.

<sup>187</sup> Despite the commitment made by former Secretary of State for Finance De Jager to explicitly include the consideration of the consequences for cross-border workers in new legislation (see the Cabinet's Opinion on the recommendations by the *Commissie Grensarbeider* (Cross-border worker Committee), 9 January 2009, 2008/2455 BCPP with reference to *Kamerstukken II* 2000/01, 26 834, No. 5).

<sup>188</sup> Based on <https://www.cbs.nl/nl-nl/nieuws/2018/25/pensioenleeftijd-werknemers-met-5-maanden-gestegen>. The actual average retirement age in Belgium was 61.3 years for men and 59.7 years for women, see [https://www.nieuwsblad.be/cnt/dmf20171205\\_03225586](https://www.nieuwsblad.be/cnt/dmf20171205_03225586).

<sup>189</sup> See <https://fd.nl/economie-politiek/1256794/actuarissen-aow-leeftijd-kan-vijf-jaar-later-stijgen-naar-67>.

aged 65 in 2023, the AOW retirement age remains unchanged for 2023, meaning that it may take until 2026, instead of 2021, to reach 67 years.

### **5.1.2 Flexibility in AOW retirement age**

The start date of the AOW pension is currently inflexible. Greater flexibility in choosing this date would allow cross-border workers with partial pensions in various Member States to enjoy their full pension on a single date. Note, however, that bringing these pensions from the different Member States forward would also lead to a proportional reduction in the amount of AOW pension. In addition, by choosing this option, i.e. to receive their full pension on the pension start date, cross-border workers would immediately qualify as multiple-state pensioners, thus preventing the transfer of the social security levy that takes place when single-state pensioners become multiple-state pensioners.

On 19 February 2016, Dutch MP Norbert Klein entered a legislative proposal for the *Wet flexibilisering ingangsdatum AOW* (Flexible AOW Commencement Date Act).<sup>190</sup> This proposal would allow its beneficiaries to take their AOW pension five years before or after the day of reaching the statutory AOW retirement age. The underlying reason for this legislative proposal was to meet the needs of people to individually shape the transition period between work and retirement. The German *Flexi-Rente* law was introduced for the same reason.<sup>191</sup> The proposal was followed by a letter of amendment, arguing a limitation of the opportunity to bring forward the AOW pension from five to two years, for budgetary reasons.<sup>192</sup>

This type of flexibility is particularly desirable from a cross-border perspective.<sup>193</sup> As the above overview of national retirement ages confirms, the Netherlands has the highest retirement age. Cross-border workers who have accrued pensions in both The Netherlands and Belgium and/or Germany will receive their Belgian or German pension earlier than their Dutch pension. This may have adverse consequences for their income.<sup>194</sup> Increasing the flexibility of the AOW age would solve several problems experienced by cross-border workers: they would be able to avoid the shift of the social security levy (caused by the transition from single-state pensioner to multiple-state pensioner) as well as the adverse effects of a lacking pension, and it would guarantee them an adequate pension income by paying out a full pension.

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<sup>190</sup> Legislative proposal by Member of Parliament Klein amending the *Algemene Ouderdomswet* (AOW - General Old Age Pensions Act) and the *Participatiewet* (Participation Act) in connection with the introduction of the option of bringing forward or postponing payment of the AOW old age pension in full or in part (*Wet flexibilisering ingangsdatum AOW* - Flexible AOW Commencement Date Act), *Kamerstukken II* 2015/16, 34 414, No. 2. It should further be noted that a legislative proposal for the increase of the AOW pension age, an additional increase in AOW and increased flexibility regarding the start date was tabled and repealed in 2011, see *Kamerstukken II* 2011/12, 33 046, No. 2 and *Kamerstukken II* 2011/12, 33 046, No. H.

<sup>191</sup> *Kamerstukken II* 2015/16, 34 414, No. 3, p. 1. See also the *Onderzoeksrapport flexibilisering AOW* (Research report on the flexibilisation of the AOW scheme):

<https://www.rijksoverheid.nl/documenten/rapporten/2017/07/14/onderzoeksrapport-flexibilisering-aow>.

<sup>192</sup> *Kamerstukken II* 2016/17, 34 414, No. 11.

<sup>193</sup> Similarly: Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 269.

<sup>194</sup> As illustrated in the ITEM Cross-border Impact Assessment 2016, Dossier 7 on the Flexible AOW Commencement Date Act: [https://www.maastrichtuniversity.nl/sites/default/files/nl\\_item\\_grenseffectenrapportage\\_2016\\_versie\\_2.1.pdf](https://www.maastrichtuniversity.nl/sites/default/files/nl_item_grenseffectenrapportage_2016_versie_2.1.pdf).

This legislative proposal was rejected on 25 January 2017<sup>195</sup>, which is regrettable, particularly from a cross-border perspective. The legislative proposal would have offered a good solution to one of the many problems that cross-border workers face and would have achieved further anchoring of the European freedoms of movement and thus have contributed to the further realisation of the European single market. The expected positive effect of the proposal on cross-border workers will not be realised.<sup>196</sup>

### **5.1.3 The increase in retirement age for German supplementary pensions (*Betriebliche Altersvorsorge*)**

On 1 January 2012, the age limit for German supplementary pensions was increased from 60 to 62 years, provided that the pension claim was granted after 31 December 2011.<sup>197</sup> This increase is related to the increase of the *Regelaltersrente* retirement age from 65 to 67 years. This age limit also applies to the so-called *Riester-Rente* and *Rürup-Rente*. The increase has not been regulated by law but was implemented on the basis of a so-called *BMF-schreiben*<sup>198, 199</sup> a document in which the Ministry sets out the basic conditions that a supplementary pension provision must fulfil to receive tax facilitation, including an age limit on the pay-out phase of the pension.

### **5.1.4 German Flexi-Rente: bringing forward or postponing its start date and the partial pension**

The German *Regelaltersrente* pension has been subject to the *Flexirentengesetz* (Flexible Pension Act) since 25 November 2016.<sup>200</sup> The purpose of this new legislation was to make the transition period from work to retirement more flexible and to make working after retirement more attractive. Firstly, workers can earn a more flexible income before reaching retirement age, i.e. combine part-time retirement with continuing to work. A prerequisite for bringing forward the *Regelaltersrente* is that the required waiting period has finished. Note, however, that the pension amount is reduced by approximately 3.6% for every year of earlier pay-out. This reduction can be easily compensated through supplementary premium payments. This scheme has been effective since 1 July 2017. Previously, active workers could, in principle, earn EUR 450 per months in additional income without incurring any pension reductions. Workers who earned more faced a reduction of their pension

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<sup>195</sup> See <https://zoek.officielebekendmakingen.nl/dossier/34414/h-tk-20162017-55-7?resultIndex=0&sorttype=1&sortorder=4>.

<sup>196</sup> See also the letter on the legislative proposal sent by ITEM to the Standing Committee on Social Affairs and Employment: <https://www.maastrichtuniversity.nl/nl/nieuws/reactie-expertisecentrum-item-op-wetsvoorstel-flexibilisering-ingangsdatum-aow>.

<sup>197</sup> This age limit has been laid down in Section 1, para. 2, sub 2 *AltZertG*.

<sup>198</sup> A type of implementation-related communication from the German Ministry of Finance.

<sup>199</sup> BMF Schreiben of 31 March 2011 (Az. IV C 3 - S 2222/09/10041; IV C 5 - S 2333/07/0003; Abruf-Nr. 114139), point 249: '*Als Untergrenze für betriebliche Altersversorgungsleistungen bei altersbedingtem Ausscheiden aus dem Erwerbsleben gilt im Regelfall das 60. Lebensjahr. Für Versorgungszusagen, die nach dem 31. Dezember 2011 erteilt werden, tritt an die Stelle des 60. Lebensjahres regelmäßig das 62. Lebensjahr.*'

(*'The minimum age for corporate old-age pension provisions for age-related retirement from business life is typically 60 years. Pension entitlements granted after 31 December 2011 will have a standard retirement age of 62 years instead of 60 years.'*)

<sup>200</sup> [https://www.deutsche-  
rentenversicherung.de/Allgemein/de/Navigation/5\\_Services/01\\_kontakt\\_und\\_beratung/02\\_beratung/03\\_haeufige\\_fragen/12\\_flexirente\\_node.html](https://www.deutsche-rentenversicherung.de/Allgemein/de/Navigation/5_Services/01_kontakt_und_beratung/02_beratung/03_haeufige_fragen/12_flexirente_node.html). For a brief description of flexibilisation, see also: [https://www.deutsche-  
rentenversicherung.de/Allgemein/de/Inhalt/1\\_Lebenslagen/05\\_Kurz\\_vor\\_und\\_in\\_der\\_Rente/01\\_Kurz\\_vor\\_der\\_Rente/02\\_arten\\_und\\_regeln\\_der\\_altersrente.html](https://www.deutsche-<br/>rentenversicherung.de/Allgemein/de/Inhalt/1_Lebenslagen/05_Kurz_vor_und_in_der_Rente/01_Kurz_vor_der_Rente/02_arten_und_regeln_der_altersrente.html).

benefits by two-thirds, by half or by one third. Since the introduction of the *Flexirentengesetz*, however, these workers can earn EUR 6,300 per year without any reduction in pension benefits.<sup>201</sup> Any additional income that exceeds EUR 6,300 is deducted from the pension and is even capped.<sup>202</sup>

### Example

X receives an *Altersrente* of EUR 950. In addition, she receives EUR 1,510 monthly from employment, i.e. EUR 18,120 per year. After deduction of the threshold of EUR 6,300, an excess amount of EUR 11,820 per year remains, equalling EUR 985 per month (one-twelfth). The pension benefit is reduced by forty percent of this amount, i.e. EUR 394 monthly, which, in principle, leads to a monthly pension of EUR 556, aside from the cap placed on the additional earnings.

In addition, pensioners can continue to work beyond the retirement age, which will increase their *Regelaltersrente* if requested. This scheme became effective on 1 January 2017, after which pensioners could continue to work after retirement for an unlimited period of time. The scheme has another advantage: there is a supplement for postponing the payment of pension benefits or a higher pension for pensioners who continue to work while on a pension and who keep making pension contributions. The pension benefits increase by 0.5% for every month of (continued) work after reaching the retirement age and not receiving any pension yet. Working on for a period of 2 years after reaching the age of retirement may increase ultimate pension benefits by approximately 17%: 12% in supplements and 5% in additional contributions.<sup>203</sup>

## 5.2 Multiple-state pensioners: towards a better coordination of taxation and social security

The parallel application of tax treaties and Regulation (EC) No. 883/2004 leads to complex situations and differences in net pension incomes in the pensioner's state of residence. The question is how to achieve better coherence of the tax and social security levies on pensions. A possible solution is the abolition of the special provisions for pensioners in the regulation, exclusive application of the main rule on the taxation of pensions (art. 18 OECD Model Convention) and the allocation of the insurance obligation to the state of residence (Art. 11, paragraph 3, item e Regulation (EC) No. 883/2004). As a result, both taxes and social security contributions would be subject to levying in the state of

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<sup>201</sup> Note that this amount of EUR 6,300 applies to all German federal states, both the 'old' and the 'new'.

<sup>202</sup> This upper limit - the so-called *Hinzuverdienstdeckel* - to additional earnings is based on the income earned in the three years prior to reaching the retirement age, on the one hand, and on the share of the expected pension benefits on the other hand. If this amount in additional earnings exceeds the maximum limit, the excess is entirely deducted from the partial pension benefit. Note that the *Deutsche Rentenversicherung* has pointed out that starting one's statutory pension early or late while continuing to work may have consequences for any additional German pensions. Exceeding the *Hinzuverdienstdeckel* in conjunction with enjoying a part-time pension may lead to a reduction in the supplementary pension in some cases. See [https://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/2\\_Rente\\_Reha/01\\_rente/04\\_in\\_der\\_rente/02\\_hinzuverdienstgrenzen/00\\_hinzuverdienstgrenzen.html](https://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/2_Rente_Reha/01_rente/04_in_der_rente/02_hinzuverdienstgrenzen/00_hinzuverdienstgrenzen.html).

<sup>203</sup> Based on [https://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/1\\_Lebenslagen/05\\_Kurz\\_vor\\_und\\_in\\_der\\_Rente/01\\_Kurz\\_vor\\_der\\_Rente/02\\_Arten\\_und\\_Regeln\\_der\\_Altersrente.html](https://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/1_Lebenslagen/05_Kurz_vor_und_in_der_Rente/01_Kurz_vor_der_Rente/02_Arten_und_Regeln_der_Altersrente.html).

residence.<sup>204</sup> This would lead to equality in the street, as guaranteed under the TFEU.<sup>205</sup> The following table shows the pros and cons of a state-of-residence levy.

Pros of a state-of-residence levy	Cons of a state-of-residence levy
Equality among neighbours in the street	Politically non-feasible and unrealistic; opposition from Member States: Member States caring for pensioners who have not contributed; no/hardly any contribution to the financing of healthcare; burden on active labour force
Coordination of social security and taxation	The Netherlands is seeking to impose a source state levy on tax-facilitated pensions accrued, including regular pension payments and payments of the redemption value of pensions and regardless of the fiscal treatment of these pensions in the pensioner's (new) state of residence. <sup>206</sup>
Social life in the state of residence and use of the public services	Exclusive levying in the state of residence may lead to foreign pension income not being declared. <sup>207</sup> This may be countered by the exchange of information linked with compliance-based systems. <sup>208</sup>
No levy shift when working in the state of residence	
Benefits for long-term care in the state of residence	
Reduction of the administrative burden of pensioners and in the Member State of origin (no double taxation); no legal uncertainty about the net pension income as a result of contributions paid in one Member State and taxes paid in another Member State	
Simplification of Regulation (EC) No. 883/2004	

<sup>204</sup> For supporting arguments, see G.J.C. Essers and M.J.G.A.M. Weerepas, 'Grensarbeid: nog steeds veel werk aan de winkel', *Vp-bulletin* 2017/45, p. 12.

<sup>205</sup> The state of residence is also in a better position to take account of personal circumstances, such as deductions or tax relief on mortgage interest, see G.J.C. Essers and M.J.G.A.M. Weerepas, 'Grensoverschrijdende pensioenen: gebrek aan samenhang tussen fiscale en sociale heffingen', *TPV* 2017/35, p. 12-13.

<sup>206</sup> See Notitie Fiscaal Verdragsbeleid 2011, p. 54-55. Given the continuing internationalisation of the labour market and the ensuing increase in the number of Dutch tax subjects who will be enjoying their accrued pensions abroad after retirement, it seems unlikely that the Netherlands will abandon this position, partly in view of the importance attached by the Dutch tax authorities to the protective pension assessments. In addition, states that facilitated the accrual of pensions through fiscal means are increasingly receiving international recognition of their desire to levy these pensions.

<sup>207</sup> See Commentary on the OECD Model Convention 2010, art. 18, par. 21.

<sup>208</sup> That cross-border exchange of information on the tax treatment of foreign pensions may be difficult was illustrated by the repeal of income tax exemptions by the Dutch tax authorities in December 2017, see the relevant Letter to Parliament <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/02/23/kamerbrief-afspraak-tussen-nederland-en-belgie-over-pensioenproblematiek>. See also the ITEM news release <https://www.maastrichtuniversity.nl/nl/nieuws/item-einde-aan-dubbele-belasting-van-pensioenen-grensarbeiders>.



The state of residence is in a better position to take account of financial position and the personal circumstances when levying, possibly leading to forms of tax relief, such as deductions <sup>209</sup>	
No need to consider the tax authorities in the other state	

A less far-reaching solution may be chosen, however, to adapt and improve the current regime. One solution could be to use the duration of the insurance as a starting point for designating the competent (pension) state.

In addition, cross-border workers might opt for tailor-made solutions. A creative individual construction could be to accept a (small partial) pension and/or a small employment contract. Pensioners increasingly accept secondary jobs to supplement their (small) pensions, as labour income and pension benefits can be cumulated to a certain extent. If Dutch or Belgian pensioners accept a job across the border, however, this will affect their social security positions. Since Regulation (EC) No. 883/2004 designates the social security legislation of the work state as the applicable legislation, those concerned shall exclusively be subject to the legislation of the work state. Single-state pensioners can achieve a social security switch by taking a job in their country of residence. This may, however, affect the rules on health insurance, for example, leading either to advantages or disadvantages.

#### **Pro-rata levying of social security and tax contributions**

A possible alternative is a proportionate (pro-rata) levy<sup>210</sup>, whereby the levy is evenly divided between the source state and the state of residence. The allocation rules or social security levies to which pensioners are subject as per Regulation (EC) No. 883/2004 must nevertheless be taken into account. The principle of exclusivity in Regulation (EC) No. 883/2004 dictates that only one Member State can levy social security contributions/charges. The allocation method, however, divides pensioners in one and the same family between their state of residence and the source state.

As Essers and Weerepas rightly state, the proportional and equal sharing of the tax levy is no solution if not linked to the exclusive levying of social security contributions.<sup>211</sup> On the one hand, this would solve the discoordination between the tax and social security levy as illustrated above with tables and examples. On the other hand, it would imply the exclusive transfer of the tax levy to the state of residence. This option does not seem very realistic, though, in light of the international efforts to impose a source-state levy on fiscally facilitated pensions during treaty negotiations.<sup>212</sup> Partly due to the increasing flow of cross-border labour, the source state levy seems to be gaining importance for Member States. If premium contributions were charged to the taxable income in the past, the state that offers these amenities wishes to see a 'return' through taxation of the pension benefit.<sup>213</sup>

<sup>209</sup>Cf. Commentary on the OECD model convention, art. 18, par. 17. See also G.J.C. Essers and M.J.G.A.M. Weerepas, 'Grensoverschrijdende pensioenen: gebrek aan samenhang tussen fiscale en sociale heffingen', *TPV* 2017/35, p. 12-13.

<sup>210</sup> For alternatives regarding a shared levy, see: Commentary on the OECD model convention, art. 18, par. 15.

<sup>211</sup> G.J.C. Essers and M.J.G.A.M. Weerepas, 'Grensoverschrijdende pensioenen: gebrek aan samenhang tussen fiscale en sociale heffingen', *TPV* 2017/35, p. 13.

<sup>212</sup> See for example Notitie Fiscaal Verdragsbeleid 2011, p. 54-55.

<sup>213</sup> Netherlands-Belgium treaty of 2001, Netherlands-Germany treaty of 2012.

Note that the Secretary of State for the Treasury and Finance stated during the parliamentary proceedings regarding the approval of the tax treaty with Germany that the Dutch government has for some time been advocating maximum avoidance of discoordination between tax and social security levies.<sup>214</sup> The government addressed this issue in detail during the parliamentary approval of the 2001 tax treaty between the Netherlands and Belgium.<sup>215</sup> According to the Secretary of State, the most viable variant would be to link the tax and social security levies in a bilateral tax treaty.<sup>216</sup> Note that it was not explained why primacy should lie with the levying of social security contributions, with fiscal levying following suit. Neither Belgium - during the conclusion of the tax treaty in 2001 - nor Germany - during negotiations on the tax treaty of 2012 - were prepared to link the taxation of cross-border workers to the country where they are subject to social security as per Regulation (EEC) No. 1408/71 or Regulation (EC) No. 883/2004. The negotiating parties dismissed the variant that would use art. 17 of Regulation No. 1408/71 or art. 16 of Regulation 883/2004 to reach a categorical agreement linking the social security levy to the tax levy, claiming that it was not desirable and the articles were not intended for this purpose.<sup>217</sup>

### **5.3 Limiting the authority of the pension state to levy social security contributions or the authority of the state of residence to levy tax**

As illustrated by the examples above, multiple-state pensioners deal with two Member States, i.e. the pension state and the state of residence. In some cases, tax is levied in the state of residence and social security contributions in the pension state or vice versa. Pensioners may thus contribute to the financing of healthcare in more than one Member State, resulting in a double disadvantage. The conflict rules in the bilateral tax treaties are essentially not in line with the conflict rules of Regulation (EC) No. 883/2004, and the authority to tax is not always granted to one Member State. The equal treatment of (retired) cross-border workers is not guaranteed due to the double obligation to contribute.

As Verschueren states, it is possible, at least theoretically, to limit the authority of the pension state to levy social security contributions or the authority of the state of residence to levy tax.<sup>218</sup> As a result, illustrated above by a number of examples, the social security levy would no longer be transferred from the moment pensioners qualify as double-pension pensioners. Germany has the authority to tax a Dutch single-state pensioner with only a German pension of more than €15,000 and levy social security contributions. While this does not constitute equal treatment in the state of residence, it does in the pension state. From the moment this pensioner starts receiving a Dutch pension as well, thus qualifying as a multiple-state pensioner, the tax levy rights are shared and the authority to levy social security contributions is allocated to the Netherlands. The authority to levy social security contributions thus transfers from Germany to the Netherlands. In this case, there is no equal treatment in the state of residence nor in the pension state.

As Verschueren rightly notes, a restriction of the pension state's authority to levy social security contributions is not the obvious choice, as the pension state bears the healthcare costs; it would not make sense to deprive this Member State of its authority to collect premiums or levy contributions.<sup>219</sup>

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<sup>214</sup> *Kamerstukken II 2013/14*, 33 615, No. 8 (Note in response to the report).

<sup>215</sup> *Kamerstukken II 2013/14*, 33 615, No. 8 (Note in response to the report).

<sup>216</sup> *Kamerstukken II 2013/14*, 33 615, No. 8 (Note in response to the report).

<sup>217</sup> *Kamerstukken II 1999/00*, 26 834, No. 3, p. 57.

<sup>218</sup> H. Verschueren et al., *Werken over de grens België-Nederland*, Antwerpen: Daalder 2011, p. 238.

<sup>219</sup> H. Verschueren et al., *Werken over de grens België-Nederland*, Antwerpen: Daalder 2011, p. 238.

This would only make sense if the obligation to bear the healthcare costs were transferred to the state of residence, a transfer that does not appear to be a realistic or politically viable option.

In addition, the authority of a state of residence to tax might be restricted. In this context, Verschueren proposes the introduction of a provision in Regulation (EC) No. 883/2004 stipulating that any tax levies that pensioners are charged in their state of residence are not payable insofar as they concern the financing of healthcare benefits.<sup>220</sup> For example, a pensioner with a pension from state A lives in Member State B, which largely finances its healthcare system through taxation and spends 7% of its tax revenues on healthcare benefits. This person is subject to taxation in Member State B and has a right to healthcare benefits there, which are borne by a Member State A, where he or she pays healthcare contributions. This pensioner could claim a reduction in income tax in Member State B, which, after all, does not have to bear the costs of the care provided. Verschueren claims that this method, while simple, may raise questions as to which percentage should be set. Although this option would contribute to the equal treatment of cross-border workers, it raises some questions as to technical aspects of implementation and the administrative burden for the implementing bodies. Member States with a healthcare system financed from general taxation may resist this option however. These Member States will gain lower tax revenues and may invoke the division of powers to oppose this development. Exchanging information on the tax treatment of pensions across borders is not easy.

#### **5.4. Agreement under Article 16 Regulation (EC) No. 883/2004**

Article 16 Regulation (EC) No. 883/2004 allows for derogation from the applicable allocation rules in the interest of cross-border workers. Pensioners, for instance, who live in The Netherlands and work in Belgium or Germany for one day a week are typically insured in the work state. While the implementation bodies of the relevant Member States can agree that Dutch social insurance is applicable, workers nor their employers tend to make use of this option. If the Dutch legislation is designated as the applicable law, a Belgian or German employer must follow Dutch social security rules. This is administratively complex for employers as Dutch legislation, e.g. the continued wage payment obligation, is often not known abroad. Private insurance is therefore sometimes preferred over the obligation to continue to pay wages.<sup>221</sup>

#### **5.5. Preventative Cross-Border Impact Assessment as part of the legislative process**

Besides the fact that preventive cross-border impact assessments should be part of new (national or European) legislation, these assessments should be multidisciplinary in nature.<sup>222</sup> A multidisciplinary approach, in particular, would reveal the compartmentalised policies and the discoordination between taxation and social security. These results could help improve the coherence between bilateral or other tax treaties and Regulation (EC) No. 883/2004. Cross-border impact assessments should therefore be welcomed for their ability to offer maximum insight into the concrete consequences of legislation and regulations at an early stage. A preventive assessment of the 'Flexibilisation of the AOW Commencement Date Act' could have shown the potentially positive

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<sup>220</sup> H. Verschueren et al., *Werken over de grens België-Nederland*, Antwerpen: Daalder 2011, p. 238.

<sup>221</sup> Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, pp. 223-224.

<sup>222</sup> See also recommendation 10, Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 314.

effects of the bill for cross-border workers who accrued a Dutch AOW pension as well as a foreign statutory pension.<sup>223</sup>

## 6. Conclusion

### 6.1 Cross-border impact

The retirement age differs between between Member States. The Dutch AOW old-age pension has a later start date than the statutory old-age pensions in Belgium and Germany. As a consequence, workers who have accrued a Dutch AOW old age pension as well as a foreign statutory pension, e.g. migrant workers and cross-border workers, must wait for their AOW pension for a period of time when their foreign statutory pension starts. This may affect their income positions, while the wide variety in retirement ages puts pressure on the overall adequacy of their pensions. The rejected legislative proposal to make the AOW start date more flexible could have had a positive impact. Flexibilisation would have offered cross-border workers the option of aligning the start date of their Dutch AOW pension with the start date of their foreign statutory pension. It is regrettable that the bill for a flexible retirement age was not adopted. It would have enabled cross-border workers to set a single start date for the statutory pension benefits that they accrued. The Dutch situation offers another solution, however: to bring forward the Dutch supplementary pension's retirement age. This would, on the other hand, deplete the pension savings of those involved and lead to a steep drop in the monthly pension benefit payable until death.

One issue that is very problematic from the EU internal market perspective is the obligation to pay double contributions due to the discoordination between taxation and social security. In some cases, tax is levied in the state of residence and social security contributions in the pension state or vice versa. Pensioners may thus contribute to the financing of healthcare in more than one Member State, experiencing a disadvantage in the form of economic double taxation. The rules of conflict in the bilateral tax treaties are essentially not in line with the conflict rules of Regulation (EC) No. 883/2004, and the authority to tax is not always granted to one Member State. The equal treatment of (retired) cross-border workers is not guaranteed due to the obligation to pay double contributions. This problem can be solved by limiting the tax authority of the country of residence. Regulation (EC) No. 883/2004 has room for the introduction of a provision stipulating that any tax levies that pensioners are charged in their state of residence levies are not payable insofar as they concern the financing of healthcare benefits.

And, last but not least, good pension information and a good cross-border pension information system can offer cross-border workers insight into the accrued pensions in various countries. A European pension register (or, on a smaller scale, a system between the Netherlands, Belgium and Germany) could give cross-border workers a clear and accurate overview of the cross-border pensions that they have accrued, particularly offering insight into the different retirement ages. Such a system would be a positive impulse for the labour mobility of workers.

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<sup>223</sup> See for examples ITEM Cross-border Impact Assessment 2016, Dossier 7 Flexibilisation of the AOW Commencement Date Act: [https://www.maastrichtuniversity.nl/sites/default/files/nl\\_item\\_grenseffectenrapportage\\_2016\\_versie\\_2.1.pdf](https://www.maastrichtuniversity.nl/sites/default/files/nl_item_grenseffectenrapportage_2016_versie_2.1.pdf).

## 6.2 Future avenues

This Cross-border impact assessment can be further developed and supplemented by, among other things, more and better cross-border data and figures. We believe that it is recommendable to carry out a coherent cross-border impact assessment during the parliamentary treatment of new legislation and to include the effects on cross-border workers when creating new pension legislation. The findings from the cross-border impact assessment should be included in a separate paragraph in the Explanatory Memorandum, taking into account the various factors that may affect the income position of cross-border workers at retirement (e.g. marital status, working longer in Belgium and/or Germany, the accrual of a supplementary pension). What analyses of border effects have taken place have been inconsistent as to their execution, i.e. have used different research methods. The above shows that the impact of new legislation on cross-border workers and border regions in general is still not receiving the attention it deserves and that border effects are still being underestimated by national legislators.<sup>224</sup>

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Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 311.

<sup>224</sup> It is a positive sign, however, that the year 2017 saw the publication of two studies on the position of cross-border workers:

- Report of the Commissie grenswerkers, *Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap no. 257, Vereniging voor Belastingwetenschap 2017.

- H. Niesten, *Belastingvoordelen van de grensoverschrijdende economisch actieve EU-persoon* (diss. Maastricht and Hasselt), 2017.

## 3.4 Baukindergeld

Dr. Hannelore Niesten

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## **Abbreviations**

EU	European Union
ECJ	European Court of Justice
TFEU	Treaty on the Functioning of the European Union.

# Baukindergeld

## 1. Introduction

The German *Koalitionsvertrag*<sup>225</sup> (Coalition Agreement) between political parties CDU, CSU and SPD includes the agreement to introduce a benefit aimed at promoting the home ownership of young families within the framework of the *Wohnraumoffensive* (the Merkel government's national building scheme). The *Baukindergeld* is a child-dependent benefit that can be made available over a period of ten years to assist with the purchase of an existing dwelling or a dwelling that has yet to be built in Germany. The benefit amounts to EUR 1,200 per child per year (up to 25 years of age).<sup>226</sup>

The conditions for receipt of the 2018 *Baukindergeld* benefit have not yet been published in full<sup>227</sup>, although it is clear that the benefit is granted to families with at least one child.<sup>228</sup> Another requirement is the purchase or construction of a dwelling. The grant is also contingent on an income ceiling: the annual taxable household income must not exceed € 75,000, a threshold that increases by € 15,000 for every child. This income limit is calculated by taking the average of the annual incomes of the past two calendar years. Depending on the number of children, the annual benefit amounts to:<sup>229</sup>

Number of Children	Per year	In 10 years
1 child	EUR 1,200.	EUR 12,000.
2 children	EUR 2,400.	EUR 24,000.
3 children	EUR 3,600.	EUR 36,000.
4 children	EUR 4,800.	EUR 48,000.
5 children	EUR 6,000.	EUR 60,000.

This means that families with three children can receive EUR 36,000 in *Baukindergeld* over a period of 10 years (10 x € 3,600), as long as they remain below the income threshold of EUR 120,000.

The *Baukindergeld* is the outcome of the *Bausparkindergeld*, a public financial support scheme for the purchase of a private home launched by the CDU (Christian Democrats) in its election programme for the elections of 24 September 2017, when Germany was doing better financially.<sup>230</sup> At the time, the

<sup>225</sup> Accessible via: [https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag\\_2018.pdf?file=1](https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1).

<sup>226</sup> Construction costs for 2018 are estimated at EUR 263 million. EUR 3 billion has been reserved for subsequent accounting years. See: <https://www.vergleich.de/baukindergeld.html>.

<sup>227</sup> On 23 June 2018 a legislative proposal to the Budget Committee included a floor area of 120 square metres for a family of four, with an additional 10 square metres per child. At the end of June it was announced that families who exceeded this threshold were not eligible for funding.

<sup>228</sup> An estimated 58,000 young families would receive the *Baukindergeld*.

<sup>229</sup> The government of the Free State of Bavaria demanded an additional benefit scheme for Bavaria on 15 May 2018: the *Baukindergeld Plus* scheme, as well as a separate home ownership grant. The *Baukindergeld* as planned by the federal government would have to be increased by EUR 300 euro per year per child in Bavaria, amounting to an additional EUR 3,000 in the 10-year term of the benefit scheme. The scheme must include a grant of EUR 10,000 for home ownership, regardless of marital status, i.e. also for childless and unmarried couples. This amount should be paid as a single lump sum. No further details have been provided for both grants, which are meant to be payable as of September 2018. See: <http://www.aktion-pro-eigenheim.de/haus/news/fuer-familien-in-bayern-gibt-es-noch-mehr-baukindergeld.php>

<sup>230</sup> Germany has no scheme that allows for mortgage interest deduction from one's income, like the Netherlands has.



SPD (Social Democrats) advocated its own scheme: *Familienbaugeld*. CDU and SPD had abolished government support for the purchase of a private home in 2005 as part of cutback measures.

To date, the benefit has no legal basis.<sup>231</sup> On 4 February 2018 CDU and SPD agreed on the introduction of the *Baukindergeld* scheme during coalition negotiations. The coalition agreement subsequently confirmed this agreement. A law still needs to be passed, however, which is due in the autumn of 2018. The scheme will apply retroactively from 1 January 2018<sup>232</sup>, applying the right to *Baukindergeld* to all new purchase contracts concluded or building permits issued for private property in Germany since 1 January 2018. Projects that do not require a building permit are entitled to new-build construction grants, provided that the municipality has been informed in accordance with construction regulations and the implementation of these projects was approved after 1 January 2018. Although it is still uncertain whether this scheme will actually be implemented (SPD members still have to vote) or how the agreements will be fleshed out legally, a number of general concerns based on European legislation can be voiced about the implications of this benefit scheme for cross-border workers. It is evident, in any event, that housing for young families must be made more affordable.

One may express doubts about the compatibility of the *Baukindergeld* with the free movement of persons. The *Baukindergeld* is reserved for residents of Germany. This begs investigation of whether the *Baukindergeld* constitutes a restriction of the free movement of persons and the freedom of establishment, laid down in Articles 21, 45 and 49 of the TFEU. This cross-border impact assessment seeks to gain more insight in the cross-border context of the proposed introduction of the *Baukindergeld*. It takes a fiscal-legal approach to the effects of the *Baukindergeld* on cross-border workers living outside Germany. In this context, it poses the question whether families that reside in the Netherlands or Belgium with one parent who works in Germany are also entitled to *Baukindergeld*.

### **Approach**

After outlining the objective and delineating the research in Section 2, Section 3 will provide an analysis of the most important cross-border effects of the *Baukindergeld* on cross-border workers who work in Germany but reside elsewhere. Section 4 addresses the complexity of the matter by categorically tracing the problems. Section 5 seeks to intensify the debate on how the current legal regime can be improved so as to make it more suitable for cross-border workers in the EU.

The following should be noted about the terminology used: the term 'non-resident' refers to individuals who work but do not live in Germany. This definition includes employees as well as self-employed persons. This contribution uses the term 'cross-border worker' to designate persons who work in Germany but do not reside there.

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<sup>231</sup> <http://www.aktion-pro-eigenheim.de/haus/news/baukindergeld-2018-ein-update-zur-baufoerderung-fuer-familien.php/>

<sup>232</sup> <http://www.faz.net/aktuell/wirtschaft/kompromiss-beim-baukindergeld-flaechenbegrenzung-aufgehoben-15661576.html>.

## 2. Research Objectives, Definitions, Themes and Indicators

### 2.2 Current or future effects, objective: ex-ante analysis

This dossier contains an ex-ante analysis of the cross-border effects of the *Baukindergeld* in the border regions of Germany, focussing on the legislative proposal for the introduction of the *Baukindergeld*. The main objects of research are the negative cross-border effects, i.e. the bottlenecks and shortcomings of the planned proposal. The proposal particularly affects families that reside outside Germany with one or both parents working in Germany. This concerns Dutch, Belgian, Luxembourg, Polish, French, Swiss and Czech cross-border workers in Germany.

In national legislation, on the other hand, the cross-border effects are less prominent and therefore, unfortunately, underexposed in the legislative process. This cross-border impact assessment seeks to compensate for a lack of border-impact assessment at legislative level by using a coherent tool for this purpose, which will be explained below under 'Principles, Benchmarks and Indicators'. This lack refers to the absence of a separate section that outlines the consequences of the *Baukindergeld* scheme for cross-border workers. In 2009 and 2012, for example, two motions were tabled asking that permanent attention be paid to the problems of cross-border workers.<sup>233</sup> In 2015 a number of political parties repeated their desire for clarification of the effects of legislative proposals on the border regions during the legislative process, in the interest of performing a cross-border impact assessment.<sup>234</sup> From a Dutch perspective, we recommend that Germany also put effort into assessing the cross-border effects of German law. Note that, during the parliamentary proceedings of the Netherlands-Germany tax treaty, a separate section was included in the Explanatory Memorandum on the impact on cross-border workers. This resulted from the fact that a tax treaty, by nature, covers cross-border employment, among other things.<sup>235</sup>

Despite the considerable efforts made by the EU to facilitate and promote the mobility of labour, the percentage of EU citizens who actually cross the border for work, whether as an employee or self-employed, remains relatively low. Only 0.9% of all workers in the EU use this opportunity. In some areas, however, such as certain border regions of Austria, France, Germany, Belgium and The Netherlands, the number of frontier workers lies well above this percentage.<sup>236</sup> It is precisely for this reason that cross-border impact assessments are useful and that the border regions deserve special attention. In short, this report uses the following definition of border region: an area separated by national borders in which cross-border employment occurs.

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<sup>233</sup> *Kamerstukken II 2011/12, 33000 IXB* (motion Bashir) and *Kamerstukken II 2009/10, 26 834, No. 26* (motion Weekers) on the importance of addressing the problems of cross-border workers. See also Commissie grenswerkers, *Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, pp. 269-270.

<sup>234</sup> *Handelingen II 2014/15, nr. 50, p. 1 -15* (Cross-Border Impact Assessment).

<sup>235</sup> *Kamerstukken II 2013/14, 33 615, nr. 3* (Explanatory Memorandum), section I.4 Grensarbeiders (on cross-border workers). The inclusion of this paragraph reflects the commitment made by former Secretary of State for Finance De Jager to explicitly include the consideration of the consequences for frontier workers in new legislation (see the Cabinet's Opinion on the recommendations by the Frontier Worker Commission, 9 January 2009, 2008/2455 BCPP with reference to *Kamerstukken II 2000/01, 26 834, No. 5*).

<sup>236</sup> Eurostat, Statistics on commuting patterns at regional level, ec.europa.eu/Eurostat (geraadpleegd 10 juli 2017); and Benelux Unie, Secretariaat-Generaal, Benelux, Kerncijfers en trends 2014, p. 41. This also shows that cross-border labour in the Benelux, France and Germany constitutes 37% of total cross-border mobility within the EU.

A quantitative analysis of the effects of the *Baukindergeld* scheme is not possible due to a lack of adequate data. Most of the figures on cross-border employment are somewhat dated and not entirely representative, since the meaning of the term 'cross-border worker' was not defined or used consistently, making it unclear who fell within the definition. In addition, these data on cross-border employment were not mapped in a coherent way, i.e. their reliability could be called into question, especially when encountering rounded numbers.<sup>237</sup>

## **2.3 Effects: on which geographical area? Definition of the 'border region'**

Cross-border workers in the border regions of Germany are confronted with the cross-border effects of the *Baukindergeld* scheme. More specifically, those affected are cross-border workers who live and work within a certain distance from the German national border. This report focuses on the relevant political entities, such as the Dutch municipalities, German *Landkreise* or Belgian *Arondissementen* to identify this group.

## **2.4 Those affected. What are the themes of the research, its principles, benchmarks and indicators?**

### ***2.3.1 The research themes of the Baukindergeld Dossier***

This dossier focusses on the theme of 'European integration', more specifically the free movement of labour and the freedom of establishment of self-employed persons. Using the ITEM Cross-border Impact Assessment method, this report compares the indicators with the benchmarks. The question arises whether a family that resides in the Netherlands or Belgium, with one parent working in Germany, is also entitled to *Baukindergeld*. Do note, however, that this family would have been entitled to this benefit if they had purchased a house in Germany. The answer to this question determines to what extent the benchmark of an open labour market has been achieved. The envisioned enjoyment of the benefit is a consequence of the free movement of persons, as laid down in Articles 45 and 49 of the TFEU, which prohibits the discriminatory treatment of active workers and self-employed persons.

### ***2.3.2 Baukindergeld dossier: what are the principles, benchmarks and indicators for achieving a positive situation in the border regions?***

Following the descriptions in the previous section, the principles, benchmarks and method of examination can be represented schematically as follows in this report:

The cross-border impact of the new *Baukindergeld* legislation on border regions can be examined from the perspective of European integration (freedoms, citizenship, non-discrimination). The cross-border impact on the socio-economic development/sustainable development and the local or Euregional cohesion and cross-border administrative structures were not examined as they are not directly impacted by the proposed legislation.

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<sup>237</sup> See also the recommendation of the Commissie grenswerkers, *Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 34.

Objective/principles	Benchmarks	Method	Indicator
European integration; non-discrimination	The situation on 1 July 2018 serves as a benchmark.  Open labour market; non-discriminatory allocation of tax and social security benefits	Comparison between a person residing in Germany and a cross-border worker living outside Germany and working in Germany	Do cross-border workers with children who reside outside Germany, with one of the parents working in Germany, have a right to <i>Baukindergeld</i> ?
Article 7, paragraph 2 of Regulation (EU) No 492/2011 on the free movement of workers within the Union	The same 'tax and social security advantages' for migrant workers as for domestic workers	Comparison between migrant workers and domestic workers	Is there a barrier to the freedom to work in Germany without residing there?
<b><i>Free travel and residence ex art. 21 TFEU in conjunction with Directive 2004/38/EC on the right to freedom of movement and residence within the territory of the Member States for the citizens of the Union and their Family members, OJ.L. 29 June 2004, [...] 229, 35; The free movement of labour pursuant to Article 45 TFEU; Freedom of self-employment ex art. 49 TFEU: no discriminatory treatment of cross-border workers.</i></b>	Parity among colleagues ('equality in the workplace')	Comparison between a cross-border worker with a house in Germany and a cross-border worker with a dwelling in a Member State other than Germany	Comparison between being granted and not being granted a benefit; Is there a barrier to the freedom to work in Germany without residing there?

The above assessment framework serves as a starting point for the cross-border impact assessment of the arrangements regarding the *Baukindergeld* in the German border regions. The indicators will enable us to draw conclusions regarding the cross-border impact of this national legislation.

## 2.4. Qualification of the advantage: social or fiscal?

Pursuant to Article 7, paragraph 2 Regulation (EU) No 492/2011 of 5 April 2011 on the free movement of workers within the EU<sup>238</sup>, migrant workers enjoy the same tax and social security advantages in the host country as domestic workers. The Court of Justice (hereafter ECJ) has defined these advantages as 'all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community'.<sup>239</sup>

It is ultimately not important whether the *Baukindergeld* should be regarded as a 'fiscal' or a 'social' advantage since cross-border workers have the right to equal treatment in both cases. The purpose and conditions of granting the *Baukindergeld* must be examined to be able to classify this advantage as a social or a fiscal advantage. This German approach of directly promoting the purchase of an existing or new-build dwelling can functionally be considered an acute negative tax, i.e. a benefit.

On the one hand, the name of the benefit, *Baukindergeld*, leaves room for arguing that this advantage is subject to the *Einkommensteuergesetz* (Income Tax Act), like regular child benefits. In addition, the *Baukindergeld* is not specifically granted to employees, but to everyone, making it a general scheme for the promotion of home ownership.

On the other hand, German *Baukindergeld* could also be classified as a social advantage.<sup>240</sup> The ECJ's interpretation of the concept of 'social advantages' is very broad, including benefits that fall within the material scope of Regulation (EC) No 883/2004,<sup>241</sup> as well as other social benefits, such as discount cards for public transport.<sup>242</sup> The *Baukindergeld* should also be granted to cross-border workers and/or their spouses who are not tax subjects in Germany at all. The concept of 'social advantage' also includes advantages that are granted simply because the beneficiaries reside within the national territory. Cross-border workers are typically in the same position as workers residing within the national territory. The German scheme, which excludes cross-border workers from this benefit, thus constitutes hidden discrimination and is consequently in breach of the free movement of persons as well as of Article 7, paragraph 2 of Regulation (EU) No 492/2011. Since the *Baukindergeld* must be regarded as an advantage pursuant to Article 7, paragraph 2 of Regulation (EU) No 492/2011, cross-border workers who work in Germany are entitled to it.

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<sup>238</sup> Regulation (EU) No 492/2011 of the European Parliament and of the Council of 05 April 2011 on the free movement of workers within the Union, OJ 141/1.

<sup>239</sup> ECJ 12 May 1998, C/85/96, *Martínez Sala*, Rec. 1998, point 25.

<sup>240</sup> See opinion by G. Essers, 'Heeft een grensarbeider aanspraak op het Duitse Baukindergeld? Ja!', accessible via <https://aha24x7.com/heeft-een-grensarbeider-aanspraak-op-het-duitse-baukindergeld/>.

<sup>241</sup> The same applies to special, non-contributory benefits. See: ECJ 11 September 2007, C-28 8/05, *Hendrickx*, ECR 2007, I-6909.

<sup>242</sup> ECJ 30 September 1975, C-3 2/75, *Cris Tini*, ECR 1975, I-1085.

There is no entitlement to *Baukindergeld*, however, under Regulation (EC) No 883/2004. Unlike the German *Familienleistungen* (family benefits including the *Kindergeld* child benefits),<sup>243</sup> the German *Baukindergeld* scheme cannot be classified as a social security benefit under European Coordinating Regulation (EC) No 883/2004.

### **3. European integration: main problems caused by the *Baukindergeld***

#### **3.1 No *Baukindergeld* for cross-border workers**

It is clear that the currently proposed scheme makes it impossible for cross-border workers to meet the conditions of eligibility since it requires that applicants reside in Germany. The question arises, however, whether this residence requirement constitutes a violation of EU law. More specifically: does this national scheme infringe upon the free movement rights awarded to cross-border workers under EU law?

#### **3.2 Assessment of the residence requirement and compliance with EU law: not EU-proof**

The design of the benefit should take into account that making eligibility for the *Baukindergeld* contingent on the house being on German territory is contrary to EU law (see also the condemnation of the *Eigenheimzulage* based on European law, *infra*).

Cross-border workers whose domicile is not on German territory are paying wage tax in Germany. A German residence requirement would exclude resident tax payers in Germany under German law (*unbeschränkte Steuerpflicht*), including non-residents with more than 90% German-source income, who are owners of their home which is located outside Germany from the German *Baukindergeld* scheme. Their country of residence usually doesn't offer them any tax benefits that encourage home ownership either, as their incomes there will generally be insufficient to be eligible for mortgage interest relief. As a consequence, they fall between two stools.<sup>244</sup>

Article 21 TFEU, which provides a general formulation of the right of every citizen of the European Union to move and reside freely within the territory of the Member States, is further specified in Article 45 TFEU on the free movement of workers and Article 49 TFEU on the freedom of establishment.<sup>245</sup> It must therefore be ascertained whether Articles 45 and 49 TFEU are in conflict with a national scheme such as the *Baukindergeld*, which makes the grant of a home ownership benefit - to which home owners with a dwelling in Germany are entitled - contingent on the owner-occupied dwellings that are being constructed or acquired being situated on German territory.

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<sup>243</sup> Pursuant to the European Regulation (EC) No 883/2004 on the coordination of social security systems, a cross-border worker is entitled to the German *Familienleistungen* (Family benefits, e.g. *Kindergeld* [child benefit]). If one parent works in the Netherlands and the other parent works in Germany, the Dutch child benefit ranks first for payment. Germany must then supplement ('*aufstocken*') the Dutch child benefit to the applicable German level to achieve equal treatment in the country of residence and in the country of employment.

<sup>244</sup> Taxpayers in the Netherlands can pass on a surplus of foreign *Box 1* income (i.e. income liable to income tax) from one year to another, the so-called 'postponement scheme' or 'storage scheme'. See Article 11 *Besluit voorkoming dubbele belasting 2001* (Decision on the prevention of double taxation).

<sup>245</sup> See ECJ rulings 26 October 2006, the *Commission v Portugal*, C-345/05, *REC.* 2006, I-10633, point 13; ECJ 11 September 2007, *Commission v Germany*, C-318/05, *ECR* 2007, I-6957, point 35.

Any nationals of a Member State who exercise or have exercised the right of free movement of workers or the freedom of establishment and freedom of professional activity in a Member State other than their state of residence fall within the scope of Articles 45 and 49 of the TFEU, irrespective of their place of residence and nationality.<sup>246</sup> The provisions of the Treaty pertaining to the free movement of persons are designed to make it easier for EU subjects to pursue any profession throughout EU territory, while preventing any measures that treat these subjects adversely in pursuing an economic activity in the territory of another Member State.<sup>247</sup>

The principle of equal treatment as laid down in Article 45 TFEU and Article 7 of Regulation (EU) No 492/2011 of 5 April 2011 not only prohibits overt discrimination by nationality but also all covert forms of discrimination which, by applying other criteria of differentiation, lead in fact to the same result.<sup>248</sup> Unless objectively justified and proportionate to the objective pursued, a provision of national law must be regarded as indirectly discriminatory when it is more likely to affect its migrant workers than its domestic workers and is therefore more likely to lead to adverse treatment of migrant workers in particular.<sup>249</sup> This is the case with a residence requirement, which domestic workers will find easier to meet than workers who are nationals of another Member State.

Provisions that prevent or discourage nationals of a Member State from leaving their country of origin to exercise their right of free movement thus form barriers to this freedom, even when they are independent of the nationalities of the workers concerned.<sup>250</sup> In this dossier, it is the *Baukindergeld* scheme that adversely treats cross-border workers who work in Germany and are building or acquiring a dwelling in the territory of another Member State to live in themselves. They are not eligible for the benefit under the current provisions, even though people who are in the same situation from an income tax point of view and are residing in Germany or are making Germany their place of residence by building or buying a house there *are* eligible for this benefit. In these circumstances, the benefit has a discouraging effect on cross-border workers who work in Germany, are enjoying the freedom of movement pursuant to Articles 45 and 49 TFEU and want to build or acquire an owner-occupied dwelling in another Member State. It follows that the *Baukindergeld* scheme violates the free movement of workers and the freedom of establishment as guaranteed by Articles 45 and 49 TFEU by imposing the condition that the owner-occupied property that is being constructed or acquired be situated on German territory.<sup>251</sup>

Established case-law shows, however, that national measures which may hinder or discourage the exercise of the fundamental freedoms guaranteed under the TFEU may nevertheless be accepted,

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<sup>246</sup> In the same vein, see also the ECJ rulings of 21 February 2006, C-152/03, *Ritter-Coulais*, ECR 2006, I-1711, point 31; ECJ 7 September 2006, C-470/04, *N, Jur.* 2006, I-7409, point 28, and ECJ 18 July 2007, C-212/05, *Hartmann, Jur.* 2007, I-6303, point 17.

<sup>247</sup> ECJ 15 September 2005, C-464/02, *Commission v Denmark*, ECR 2005, I-7929, point 34; and ruling ECJ 11 September 2007, *Commission v Germany*, cited above, point 114.

<sup>248</sup> ECJ 23 May 1996, C-237/94, *O'Flynn*, ECR 1996, I-2671, point 17.

<sup>249</sup> ECJ 23 May 1996, C-237/94, *O'Flynn*, ECR 1996, I-2671, point 20.

<sup>250</sup> See the ECJ rulings cited above: ECJ 15 September 2005, C-464/02, *Commission v Denmark*, ECR 2005, I-7929, point 35; ECJ 26 October 2006, C-345/05, *Commission v Portugal*, ECR 2006, I-10633, point 16, and the ECJ ruling of 11 September 2007, C-318/05, *Commission v Germany*, ECR 2007, I-6957, point 115.

<sup>251</sup> Cf. ECJ 26 October 2006, C-345/05, *Commission v Portugal*, ECR 2006, I-10633, point 25.

provided they are taken in pursuit of a general interest, are suitable for securing this interest, and do not go beyond what is necessary to attain the objective.<sup>252</sup>

In this case, Germany could claim that the condition laid down in the *Baukindergeld* scheme is justified by the general interest of achieving an adequate supply of real estate through promoting the construction of houses in its territory. This condition does, at any rate, go beyond what is necessary to achieve the desired goal nevertheless. The goal, i.e. meeting the demand for housing, could be achieved equally effectively if resident taxpayers in Germany subject to German law chose to reside in the territory of another Member State, rather than in Germany.<sup>253</sup> The above shows that the *Baukindergeld* scheme imposes an illegal restriction. Pursuant to Article 21 TFEU, this conclusion also applies to economically non-active persons residing in Germany who are resident income taxpayers in Germany subject to German law, for the same reasons.

### **3.3 Entitlement of cross-border workers to German *Baukindergeld* under EU law**

This begs the question whether cross-border workers with children who work in Germany and reside in another Member State are entitled to the German *Baukindergeld* benefit. *Baukindergeld* can be seen as a personal and family benefit as referred to in the ECJ ruling in the *Schumacker* case.

In a number of rulings, the Court of Justice has already expressed its opinion about tax schemes in which Member States only provide incentive for domestic activities or objects. In most cases, however, the purpose *behind* these schemes went beyond the purely national. In its ruling on the German home ownership benefit, the Court states that the objective to meet the demand for housing might be achieved equally well by promoting the acquisition of foreign owner-occupied dwellings.<sup>254</sup>

As regards social benefits, the Court of Justice ruled that the right to equal treatment, particularly in the field of social benefits, is an important factor in integration in the host state.<sup>255</sup>

#### **3.3.1 Cross-border workers in *Schumacker* situations**

In the *Schumacker* ruling, the ECJ ruled that it is generally not discriminatory behaviour when a Member State declares a non-resident not eligible for certain tax advantages granted to residents, given that both categories of taxpayers are not in comparable situations. Under these circumstances, the free movement of workers in principle does not preclude a Member State from applying a scheme that taxes the income of non-residents employed in this state more heavily than that of residents working in the same capacity. The European Court of Justice subsequently made an exception for non-residents who enjoy no significant income in their state of residence and generate the main part of their taxable incomes by working in another Member State.

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<sup>252</sup> See particularly ECJ 26 October 2006, cited above, C-34 5/05, *Commission v Portugal*, ECR 2006, I-10633, point 24.

<sup>253</sup> In this context, see ECJ Ruling 26 October 2006, C-345/05, *Commission v Portugal*, ECR 2006, I-10633 point 35.

<sup>254</sup> ECJ 17 January 2008, C-152/05, *Commission v Germany*, ECR 2008, I-39, point 28.

<sup>255</sup> ECJ 30 April 1996, C-308/93, ECR 1996, I-12097 See I. Van der Steen, 'Gelijke behandeling gezinsleden migrerende werknemers', *NTFR* 1996, 173-176.



Most cross-border workers in Germany find themselves in a ‘Schumacker situation’.<sup>256</sup> Most people who are resident taxpayers in Germany under German law but live outside Germany earn almost their entire family income in Germany (90%) and must therefore be treated the same as residents of Germany as regards personal and family benefits. If financial compensation is denied to persons who live outside Germany but are resident taxpayers there, this constitutes indirect discrimination and thus a conflict with EU law.<sup>257</sup> EU law, after all, grants migrant cross-border workers the same treatment as comparable workers in the host country, creating a Schumacker situation. Germany must therefore also grant *Baukindergeld* to cross-border workers who earn more than 90% of their incomes under German tax law, which constitutes unlimited tax liability in Germany, for the purchase or construction of private dwellings outside German territory. On the other hand, EU law also states that it is important whether or not the state of residence can take into account the personal and family circumstances of the taxpayer.<sup>258</sup> The state of residence may be unable to do so due to a lack of sufficient taxable income there. If Germany, as the state of work, is able to take these circumstances into account, however, because the person concerned has sufficient income there, Germany will have to grant the benefit even if the 90% income threshold is not met.

### **3.3.2 Cross-border workers in non-Schumacker situations**

Pursuant to Article 7, paragraph 2 Regulation (EU) No 492/2011 of 5 April 2011 on the free movement of workers within the EU, migrant workers enjoy the same ‘tax and social security advantages’ as domestic workers in the host country. Since the *Baukindergeld* must be regarded as an advantage as per Article 7, paragraph 2 of Regulation (EU) No 492/2011, cross-border workers who work in Germany are entitled to it. Cross-border workers are, after all, entitled to the same social advantages as their German colleagues. Equal treatment in the workplace also applies to Belgian, Dutch, Luxembourgish, Polish, French, Swiss and Czech cross-border workers in Germany.

### **3.4 Lessons learned from the previous European condemnation of the German *Eigenheimzulage***

The *Baukindergeld* is the successor of the *Eigenheimzulage* in Germany<sup>259</sup>, a home ownership benefit for families that existed between 1995 and 2005. This benefit was awarded to families with children who wanted to acquire property and amounted to about EUR 800 per year per child. This tax-free benefit scheme was abolished in 2005.<sup>260</sup> Resident taxpayers in Germany under German law who acquired a property in Germany were eligible for the *Eigenheimzulage*.<sup>261</sup> Germany refused to pay the

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<sup>256</sup> Among other rulings: ECJ 14 Februari 1995, C-279/93, *Schumacker*, ECR. 1995, I-225 See also H. Niesten, *Belastingvoordelen van de grensoverschrijdende EU-persoon. Een onderzoek naar de behoefte aan en de mogelijkheden van het minimaliseren van fiscale belemmeringen van het vrije personenverkeer in de Europese interne markt*, diss. Hasselt and Maastricht, 2017

<sup>257</sup> Among other things, the freedom of movement for workers in Art. 18 and 45 TFEU; the freedom of establishment for self-employed persons in art. 49 TFEU.

<sup>258</sup> See ECJ 9 februari 2017, C-283/15, X, ECLI:EU:C:2017:102, point 42.

<sup>259</sup> The *Eigenheimzulage* was set out in Section 2(1), first sentence, *Eigenheimzulagengesetz* (German law on the private home ownership benefit), version of 1997, as amended by the 2004 *Haushaltsbegleitgesetz* (the accompanying Budget Act of 2004)

<sup>260</sup> *Gesetz zur Abschaffung der Eigenheimzulage* of 22 December 2005 (law repealing the private home ownership benefit), *BGBI.* 2005 I, p. 76.

<sup>261</sup> Section 1 of the *Einkommensteuergesetz* (Income Tax Act), in the *BGBI* version. 2002 I, p. 4210 (hereafter: “EStG”).

*Eigenheimzulage* to cross-border workers who worked in Germany however. The *Eigenheimzulage* was abolished after the European Parliament asked the European Commission in 2003 whether the refusal of Germany to pay the *Eigenheimzulage* to cross-border workers was contrary to EU law.<sup>262</sup> Then-acting European Commissioner Bolkestein was of the opinion that a cross-border worker who was subject to German tax without limitation was entitled to the German *Eigenheimzulage*.<sup>263</sup> The Court of Justice ruled against the German government in an infringement action launched by the European Commission in 2008.<sup>264</sup> Cross-border workers who had applied received the *Eigenheimzulage* after all with retroactive effect.

It is further important to note that, in *its Lakebrink* ruling, the Court of Justice ruled that it constitutes a breach of the freedom of movement for workers not to take into account the negative income of (rented) property situated in another Member State (in this case Germany) for the purposes of the determination of the tax rate applicable to his Luxembourg income.<sup>265</sup> It follows from the *Renneberg* ruling that a fictional domestic taxpayer must be allowed under EU law to deduct his or her negative income from his or her own home in Belgium from his or her Dutch labour income.<sup>266</sup>

## 4 Potential solutions

### 4.1 Don't limit the scheme to properties situated in Germany

The *Baukindergeld* must not be restricted to property owners in Germany. Cross-border workers who live outside and work in Germany are also entitled to the benefit. The regulations on the free movement of persons and European citizenship do not allow for any distinction according to place of residence.<sup>267</sup>

### 4.2 Cross-border impact assessment

The author recommends that a coherent analysis of the expected impact of the new legislation on cross-border workers be incorporated in the parliamentary scrutiny of new legislation, possibly as a separate section of the Explanatory Memorandum. Such analyses of cross-border effects as have taken place so far have not been implemented coherently, i.e. have used different research methods. The cross-border impact of new legislation on cross-border workers and border regions is generally still not being adequately examined, i.e. border effects are still being underestimated by national legislators.<sup>268</sup>

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<sup>262</sup> Written question E-3846/02 to the Commission by Ieke van den Burg (PSE) and Wilfried Kuckelkorn (PSE). See: J. Feijen, 'Bolkestein: Duitsland moet Eigenheimzulage verlenen aan grensarbeiders', *NTFR* 2003, episode 16, p. 679.

<sup>263</sup> <http://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX%3A92002E003846>

<sup>264</sup> ECJ 17 January 2008, C-15 2/05, *Commission v Germany*, ECR 2008, I-39, V-N 2008/10.6.

<sup>265</sup> ECJ 18 July 2007, C-182/06, *Lakebrink*, ECR 2007, I-6705.

<sup>266</sup> ECJ 16 October 2008, C-527/06, *Renneberg*, ECR 2008, I-7735, ECR 2008, I-7735

<sup>267</sup> ECJ 17 January 2008, C-152/05, *Commission v Germany*, ECR 2008, I-39.

<sup>268</sup> On the positive side, however, two studies on the position of cross-border workers were published in 2017:

- Report by the Commissie grenswerkers (Committee for cross-border workers), *Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken* (Geschriften van de Vereniging voor Belastingwetenschap no. 257), Vereniging voor Belastingwetenschap 2017.

- H. Niesten, *Belastingvoordelen van de grensoverschrijdende economisch actieve EU-persoon* (diss. Maastricht and Hasselt), 2017.

## 5 Conclusion *Baukindergeld*

This research report has studied the consequences of the legislative proposal to introduce *Baukindergeld* in Germany. This child-related benefit is only granted to families who reside in Germany. Cross-border workers who live outside Germany are thus excluded from the benefit. The investigation shows that the precise conditions and the scope of the measure are still part of an ongoing political process. The *Baukindergeld* scheme, as proposed in July 2018, however, is under pressure from the EU. The free movement of persons prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which lead in fact to the same result by the application of other criteria of differentiation. Domestic workers are more likely to comply with a residence requirement than workers who are nationals of other Member States. In addition, the granting of 'fiscal and social advantages' as per Regulation (EU) No 492/2011 cannot be denied to migrant workers. The grant of this benefit cannot therefore be made contingent on a claimant's residing in the German territory.

### 3.5 The Social Security of the Non-Standard Worker: A National and European Challenge

*Dr. Saskia Montebovi*

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# The Social Security of the Non-Standard Worker: a National and European Challenge

*Offering access to social protection is crucial for the economic and social safety of the workforce and well-functioning labour markets that create jobs and sustainable growth. Nevertheless, there is a growing number of people who, due to their type of employment relationship or form of self-employment, are left without sufficient access to social protection.*<sup>269</sup>

## 1. Introduction

Now that more and more workers, in the Netherlands as well as in other Member States, can no longer be regarded as standard employees<sup>270</sup>, it is useful to investigate the social security protection of this growing group of non-standard workers. Who are they? What protection do they have, what protection do they lack and what happens in a cross-border work situation? In addition, this dossier includes the work situations of platform workers as a special type of non-standard worker.

The dossier will start with a definition of a number of concepts as well as a description of the background of this research theme. *Non-standard workers* are workers who are no longer bound by a standard employment relationship. The standard employment relationship is still regarded as the benchmark in both labour and social security law. It assumes full-time employment with one employer for an indefinite period of time.<sup>271</sup> More and more workers, however, have part-time work, full-time intermittent work or a combination of multiple part-time jobs. Others have on-call contracts, whether or not in combination with a small job as a self-employed worker.<sup>272</sup> In short, variety among workers is large and growing. The legislation on labour and social security that is supposed to offer protection is either still lacking or out of sync with practice.

Major efforts are underway at the national and at the European level to offer this category of 'new' workers - which may turn out not to be that 'new' after all<sup>273</sup> - the appropriate protection. The key questions are: what is appropriate protection, who decides that, and on what basis? The government or the workers themselves? And: is there a common denominator for this large group of non-standard workers? The Dutch Minister of Social Affairs and Employment Koolmees promised a solution to the, sometimes diffuse, distinction between employees and self-employed persons by 2020, so that pseudo self-employment and abuse of the legislation can be banned. Europe also has an open eye for

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<sup>269</sup> European Commission: Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, p.1.

<sup>270</sup> The term 'employee' was chosen deliberately to distinguish them from the non-standard 'workers', whose situation will be addressed later in this dossier.

<sup>271</sup> K.V.W. Stone & H. Arthurs, 'The transformation of employment regimes: a worldwide challenge', in: K.V.W. Stone and H. Arthurs (eds.), *Rethinking workplace regulation: Beyond the standard contract of employment*, New York: Russell Sage Foundation 2013; see also European Commission: Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, p.1.

<sup>272</sup> For the Netherlands: see CBS, search term: *Arbeidsdeelname* (labour market participation), key figures [www.cbs.nl](http://www.cbs.nl); for Europe, see European Commission, Proposal for a Council Recommendation, COM(2018) 132 final, p.3.

<sup>273</sup> See R. Knegt, 'De werknemerachtige vanuit historisch perspectief', in: J.H. Bennaars, J.M. van Slooten, E. Verhulp, M. Westerveld (red.), *De werknemerachtige in het sociaal recht. Een verkenning*. Deventer: Wolters Kluwer 2018, p.9 e.v.; See also S. Montebovi, A. Barrio en P. Schoukens, 'De sociale zekerheid en de niet-standaard arbeidsrelaties: ontwikkelingen in Europa en Nederland', *Tijdschrift Recht en Arbeid (TRA)*, 2017/10, p.15.

the, sometimes dire, situations of non-standard workers. This is visible through various initiatives. These initiatives are not binding however.<sup>274</sup>

This dossier alternately uses the terms *non-standard workers* and *atypical workers* to cover the same group. The relevant national and international literature also alternates between both terms.

*Platform workers* are a special type of non-standard worker, whose clients offer work, i.e. a product or service, on a platform, for the interested worker to perform offline or online. The *platform* is, in other words, the link between the supply and demand of work or services and has a huge potential range. Some of these platforms take the shape of a digital wall (e.g. *Werkspot* [a Dutch website linking the supply and demand of blue-collar work]), while others, such as Foodora and Deliveroo, assume the role of mediator. The great advantages of this form of division of labour are 1) the flexibility for both platform workers and the platform; 2) the low cost for the platform, as well as for the suppliers; 3) low prices for users due to stiff price competition, and 4) the speed of outsourcing and completing jobs.<sup>275</sup> The method also has several drawbacks however: 1) it introduces a 'race to the bottom', so that the price of the product or service delivered is often minimal, as is the social protection of the platform workers involved; 2) there is volatility and anonymity in the working relationships (which can also be an advantage sometimes); 3) the legal status of the workers is unclear<sup>276</sup>: their position is sometimes closer to that of an employee, sometimes to that of a freelancer or a self-employed person without employees (Dutch: *ZZZP-er*) and is sometimes a combination of both statuses; and finally 4) platform workers depend on customer reviews and ratings and their interpretations by the platforms without the right of reply. In short: working through platforms is booming, but the legal framework lags behind.

The content of platform work varies greatly. The job may be physical (with offline orders), e.g. the taxi drivers at Uber or the participants in *Werkspot.nl*. It may also involve online commissioning, however, such as the translation of texts, the sorting of photos, the editing of certain information files, etc. through platforms like Amazon Mechanical Turk and Clickworker, which offer tasks that can be executed fast, cheap, worldwide and on-demand.

This 'working relationship' is clearly different from the standard working relationship, in that platform workers are not expected to work full-time with a single employer for an indefinite period of time. While this difference in working relationship is inherent to this legal concept, what is lacking is a clear framework of rights and obligations in the fields of labour law and social security law. It is precisely for this reason that platforms, but also the workers themselves, frequently use of all sorts of constructions that are deemed highly attractive for one or both parties. Alongside freedom and

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<sup>274</sup> See for example the European Pillar of Social Rights; the European Agenda for the Collaborative Economy; the 2018 Commission Work Programme; the White Paper on the future of Europe; the Proposal for a Recommendation on access to social protection for workers and the self-employed; and the Proposal for a Directive on transparent and predictable working conditions in the EU.

<sup>275</sup> See also European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European agenda for the collaborative economy*, COM(2016) 356 final, p.2. The European Commission did not use the terms 'pros' and 'cons', opting instead for 'new opportunities' and 'issues'.

<sup>276</sup> K. Frenken, 'Hoe kan de onduidelijke status van platformwerkers verhelderd worden?', [Me Justice](#), 13 November 2017.

economic gain, this leads to abuse, legal uncertainty, inequality before the law, lack of legal protection, etc.<sup>277</sup>

The debate on the social security position of non-standard workers is in full swing, and a concrete solution is not yet in sight. Several factors play a role and influence the search for a satisfactory solution. It is not possible to limit oneself to the existing social security schemes in finding out where a person is insured and against what exactly; fiscal and labour law aspects are of great importance as well. Some of the questions that one might pose and that the government obviously aims to address as well are: in which country are social security contributions due if a person's place of work and work hours are constantly changing, overlapping, or, worse still, are not transparent? Another question is how to deal with thresholds in taxation or social security, below which no contributions are due and no insurance is provided, or thresholds, below which no contributions are due but insurance *is* being provided, such as the Dutch resident schemes for old-age pensions and health insurance. Imagine someone who is combining three small, part-time jobs, whether or not through platform labour, and continually remains under the insurance threshold. This person may earn enough to live now but may not be able to save for later or for times of adversity, such as disease or a shortage of work. If this person lives in The Netherlands, (s)he will probably be able to fall back on healthcare arrangements and later on his or her statutory AOW old-age pension. The question is, however, how those benefits will continue to be financed if little or no contributions are paid. Another example is that of a person who is combining various statuses in different countries: a public servant in the Netherlands for one day, a self-employed worker in Germany for a day and a half and an on-call contract in Belgium. The current social security regulations, both national and European, are no longer sufficient to determine the position of these hybrid workers.

The lack of a coherent social security system for non-standard workers at national and European level constitutes a threat to social security. Not only the workers themselves, but also their clients and the state are faced with the insecurities and the legal vacuum associated with these non-standard workers.

Bottlenecks arise when law and practice are not in line (anymore). These bottlenecks can be divided into different categories, each requiring a different approach.<sup>278</sup> When it comes to social security for non-standard workers, those concerned again resort to creative approaches if the arrangements are not effective and efficient. These tend to benefit the clients or employers rather than the non-standard workers, and both groups are ultimately better served with a clear legal framework. This furthers the creation of a fair labour market, the free movement of persons, stronger European social inclusion and decent social security protection for all workers.

In its proposal of December 2016 to amend Coordination Regulations 883/2004 and 987/2009, the European Commission indicated a desire for the creation of simple, fair, effective and clear rules on the one hand, and for a better sharing of the financial and administrative burdens between Member States on the other hand.<sup>279</sup> Strangely enough, the pressing theme of social security for these new

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<sup>277</sup> Cf. the situations of workers at Deliveroo, Uber, Helpling, etc.

<sup>278</sup> For five categories of bottlenecks in cross-border traffic, see: S. Montebovi, *Activering en privatisering in de Nederlandse ziekte- en arbeidsongeschiktheidsregeling in grensoverschrijdende situaties*, Apeldoorn/Antwerpen: Maklu-Uitgevers 2016, p.400-401.

<sup>279</sup> Proposal for a Regulation of the European Parliament and of the Council, 13 December 2016, COM(2016) 815 final, pp.2-4; see also 2017 ITEM Cross-Border Impact Assessment, Dossier 3: Social Security.

workers was not addressed anywhere in this amending proposal. There still appears to be insufficient political will or sense of necessity to achieve better coordination of this theme via mandatory additions to the Coordination Regulations. Europe has shown recent signs of interest, however, in this lack of social insurance for workers at national and cross-border level.<sup>280</sup>

## 2. Objectives & Method

### 2.1 Current or Future Effects: Ex-post

This cross-border impact assessment is an ex-post analysis of the social security position of non-standard workers, in that it is based on existing legislation only for lack of new legislation. The present Dutch schemes nor the European coordination rules have, in recent years, incorporated any concrete steps that might offer atypical workers more clarity on their current and future social security positions. While high on the agenda, the theme is complex and therefore not easily addressed.<sup>281</sup> EU Commissioner for Employment, Social Affairs, Skills and Labour Mobility Thyssen has indicated, however, that all workers deserve access to social protection.<sup>282</sup> Likewise, many experts in The Netherlands are reflecting on the legislative approach and on how to flesh out any ensuing legislation.<sup>283</sup>

The Netherlands has had several forms of atypical work for decades: part-time contracts, employment agency contracts, temporary contracts, etc. Platform workers and highly mobile workers are novelties, however, for whom the current legislation is inadequate or lacking altogether. The assessment below mainly focuses on these two groups of workers, since the current Dutch legislation is absolutely sufficient for part-time workers and workers on temporary contracts, provided that they have only one employer (as opposed to multiple employers) and do not work across borders too often.

### 2.2 Delineation

This dossier uses a broad interpretation of the term 'border region', including not only a certain border region within a certain Member State, for example the Dutch border region with the Flemish provinces, the province of Liège or Germany, but rather every part of the Netherlands where cross-border traffic may occur. This means that the 'border region', as referred to here, is not linked to certain Euregions or other definitions of a border region but comprises all territories in Europe where any form of cross-border work activity occurs and is studied from a Dutch perspective. The term border region is thus relevant for the classic cross-border workers who travel back and forth on a daily basis but also for workers who combine work in one Member State, e.g. the Netherlands, with a (digital) job in another European Member State.

The second definition is that of the group of workers covered by this study. Previous cross-border impact assessments addressed the mobility of labour on the basis of the percentage of EU citizens

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<sup>280</sup> See also the introductory paragraphs.

<sup>281</sup> K. Frenken, 'Hoe kan de onduidelijke status van platformwerkers verhelderd worden?', [Me Justice](#), 13 November 2017; see also the introduction to this report.

<sup>282</sup> European Commission press release of 21 December, 2017, accompanying the proposal for this Directive, COM(2017) 797 final.

<sup>283</sup> See, for example, the position papers written for the 'Werk in de platformeconomie' (Working in the platform economy) round-table discussions of the Netherlands House of Representatives Standing Committee on Social Affairs and Employment, The Hague, 16 November 2017.



that actually crossed the border as a worker or as a self-employed person. Labour mobility has a different character in this report<sup>284</sup>, however, as the new forms of work often no longer require physical traffic to another Member State. Labour mobility is low for those who mainly have digital working relationships; these new workers can perform paid work from their workplace, either at home or at another location of their choosing, and qualify as workers. This report thus pertains to a potentially large group of workers.

This dossier also studies other non-standard workers alongside platform workers (see Introduction). This group is quite varied and difficult to bring under a common denominator. It includes, for example, people who have successive intermittent temporary jobs, who combine several part-time jobs or who combine various statuses, i.e. those of public servant, employee, and self-employed worker. It also includes people who combine on-call contracts with a job as a freelancer or people who work at one company in Member State X but can also work for the same employer from home in Member State Y. This form of teleworking, while on the rise, remains a remarkable legal concept.

The third definition in this report is that of the object of research, namely the applicable social security legislation in atypical or non-standard, cross-border work situations. The specific bottlenecks and (proposed) measures concerning workers' rights or tax law are excluded.

## **2.3 The Dossier's Research Themes, Principles, Benchmarks and Indicators**

### **2.3.1 Research themes**

ITEM Cross-border Impact Assessments are delineated by the following three themes: European integration, sustainable and socio-economic development and Euregional cohesion.

Theme 2, sustainable development, is heavily dependent on quantitative data. It is difficult, however, to establish the number of people involved in the research object of this dossier, the capacity in which they are involved, and the share of the economy that they represent.<sup>285</sup> It is as yet unclear how many people work in non-standard working relationships and how many work in digital working relationships, and this may not be measurable in the future. In its Communication on 'a European agenda for the collaborative economy' the European Commission does state, however, that the 'collaborative economy is small but growing rapidly, gaining important market shares in some sectors.'<sup>286</sup> The European Commission estimated that the gross incomes of sharing platforms and their providers represented approximately EUR 28 billion in 2015. Their future contributions to the European economy could grow to between EUR 160 billion and EUR 572 billion, according to the European Commission in the same communication. The amounts and time paths mentioned remain rather opaque and broad, but the collaborative economy has nonetheless forged its role in society and the economy.

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<sup>284</sup> ITEM Cross Border Impact Assessment 2017, Dossier 3: Social Security.

<sup>285</sup> Cf. the Introduction section.

<sup>286</sup> European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European agenda for the collaborative economy*, COM(2016) 356 final.

Theme 1, European integration, studies the cross-border impact that the current (inadequate) legislation on the European freedoms, European citizenship and non-discrimination has on citizens and businesses. Since this report seeks to clarify the applicable legislation on non-standard workers, its focus is on the discrimination or barriers that these workers encounter compared to workers who reside and work in a single Member State. Another topic for research is whether employers or clients encounter any obstacles in hiring non-standard workers and whether they are consequently more inclined to confine themselves to a national work situation. Note further that it is not always clear where platform workers are physically located. Offline assignments, such as taxi rides and food delivery, are of course performed in a particular location in a particular Member State. If these non-standard services are combined with other work activities in another Member State, however, the situation becomes opaque again and difficult to fathom.

Theme 3, Euregional cohesion, focuses on the cooperation of governments, citizens and entrepreneurs from a Euregional perspective. It might, for example, be investigated whether entrepreneurs on both sides of the border can work together in their own interest as well as in the interests of the workers they are trying to attract. There will be some overlap with theme 1 due to the research topic chosen.

### 2.3.2 Social Security Dossier: Principles, Benchmarks and Indicators for Establishing a Positive Situation in Border Regions:

Theme	Principles	Benchmark	Indicators
European Integration	<p><b>Free movement of persons</b></p> <ul style="list-style-type: none"> <li>- Art.45 TFEU<sup>287</sup></li> <li>- Art.48 TFEU</li> <li>- Recitals 1, 17 and 18, 29 Regulation (EC) 883/2004<sup>288</sup></li> <li>- Recitals 6, 8, 9 and 22 Regulation (EC) 987/2009<sup>289</sup></li> <li>- <b>Articles 11 and 13 Regulation (EC) 883/2004: applicable law</b></li> <li>- Articles 6, 14 and 16 Regulation (EC) 987/2009</li> </ul> <p><b>Equal treatment</b></p> <ul style="list-style-type: none"> <li>- Art.18 and 19 TFEU</li> </ul>	<p>1) <i>Comparison of non-standard workers and standard workers in a <u>national work situation</u>: standard employees and standard self-employed workers are subject to the national social security legislation of their country of employment in non-cross-border work situations, and the outcomes are (mostly) clear.</i></p> <p>2) <i>Comparison of non-standard workers in a national work situation with non-standard workers in a <u>cross-border work situation</u>: the Coordination Regulations</i></p>	<p>1) In a <u>national work situation</u>, the <i>standard</i> employee or self-employed worker is always classified under one of the existing pillars of the national social security scheme: the employee scheme, the self-employed worker scheme or another scheme, such as the intermediate worker scheme in the UK or the <i>Arbeitnehmerähnliche</i> (employee-like) scheme in Germany. Of <i>non-standard</i> workers, such as platform workers or self-employed workers, however, it is not always clear to which pillar they belong. Is the Deliveroo or Foodora deliverer or the</p>

<sup>287</sup> TFEU: Treaty on the Functioning of the European Union.

<sup>288</sup> Regulation (EC) 883/2004, also known as the Basic Regulation.

<sup>289</sup> Regulation (EC) 987/2009, also known as the Implementing Regulation.

	<ul style="list-style-type: none"> <li>- Recitals 5 and 8 Regulation (EC) 883/2004</li> <li>- Articles 4 and 7 Regulation (EC) 883/2004</li> </ul> <p><b>Ensuring adequate social protection and combating social exclusion</b></p> <ul style="list-style-type: none"> <li>- Art.9 TFEU</li> <li>- Art.352 TFEU (to regulate the social protection of self-employed workers)</li> </ul> <p><b>European citizenship</b></p> <ul style="list-style-type: none"> <li>- Art.20 TFEU</li> </ul>	<p>place non-standard employees and non-standard self-employed workers in cross-border situations under the social security legislation of the country of employment. But which state is the country of employment in atypical work situations? And why does the country of residence nevertheless take precedence sometimes, even though the country of work is the main link (e.g. when teleworking)? The national legislation is always applicable in national work situations, regardless of the number of hours worked from home.</p>	<p>Uber taxi driver an employee or a self-employed person or does he have another status?</p> <p>2) Non-standard workers in <u>cross-border work situations</u> are still evaluated according to the work-state principle under existing European legislation (Art.11 and Art.13 883/2004), even if they change jobs frequently, engage in teleworking, and/or combine different statuses (of public servant, self-employed worker and employee). Sometimes they are evaluated according to the state-of-residence principle (art.13 883/2004), however, even if the ties with their country of employment are closer than those with their country of residence.</p>
Sustainable development/ socio-economic development	<ul style="list-style-type: none"> <li>- Article 3, paragraph 3, TFEU<sup>290</sup></li> <li>- Art.151 TFEU</li> <li>- Protocol No 28 at TEU and TFEU</li> </ul>	N/A	N/A
Euregional cohesion	<p><b>Economic, social and territorial cohesion</b></p> <ul style="list-style-type: none"> <li>- Art.174 TFEU</li> </ul> <p><b>Loyal cooperation:</b></p> <ul style="list-style-type: none"> <li>- Art.4 TFEU</li> </ul> <p><b>Closer cooperation between Member States</b></p> <ul style="list-style-type: none"> <li>- Art.20 TFEU</li> <li>- Recitals 2, 8 and 9 Regulation (EC) 987/2009</li> <li>- Chapter II Regulation (EC) 987/2009</li> </ul> <p><b>Europe 2020 strategy</b></p>	<p>1) <i>Comparison of the non-standard workers with the standard workers in a <u>national work situation</u></i></p> <p>2) <i>Comparison of the non-standard workers in a national work situation with the non-standard workers in a <u>cross-border work situation</u>.</i></p>	<p>1) Companies are departing for or are considering departure for non-EU territory where the rigid designation rules of Regulation (EC) 883/2004 do not apply.</p> <p>2) Employers are avoiding cross-border work situations as they prove complicated.</p> <p>3) Employees are confronted with discrimination on grounds of place of residence because working partially in the country of residence may affect the</p>

<sup>290</sup> TEU: Treaty on the European Union.

	<p><b>The European Commission's focus on social cohesion</b>  European Commission,  Communication: stimulate growth and cohesion in the EU border regions,  COM(2017) 534 final/2</p>		<p>designation of applicable law. This is certainly an issue for cross-border workers and their employers, and thus for the border regions.</p>
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### 3. Evaluation of the theme of European Integration

The positions of non-standard workers in general and platform workers in particular are determined by national and European rules or the absence of these rules. Previously, when a standard employment relationship was usually limited to one workplace, it was easier to establish the social security position of workers; this was done on the basis of national law or European Coordination Regulations, where the work-state principle is still leading.

A cross-border outlook is needed now more than ever, however, as non-standard workers, including platform workers, obviously no longer restrict themselves to working within one and the same country. It is no longer exceptional, for example, for part-time workers to (be asked to) temporarily step in in another position in a neighbouring country. In addition, (young) people are attracted by the 'digital nomad culture', in which they are temporarily on the move - sometimes for years -, working in different places around the world from their laptops.<sup>291</sup> These people often no longer feel bound to a country or nationality and move across Europe and further with ease. The European Coordination Regulations (EC) 883/2004 and 987/2009 can no longer protect these new workers under the existing, relatively rigid rules. Work and labour relations have become (overly) complex, to the detriment of social security protection.

The effects on the border region are significant but difficult to reveal, as non-standard work is quite varied in terms of size and numbers of people involved. The Netherlands has had a large number of part-time workers for decades, while the group of self-employed workers without staff has also increased significantly. Both groups of workers are non-standard workers because they are not bound by a full-time, indefinite employment contract with one employer. Alongside these atypical workers, there are online and offline workers, many on-call contracts, zero-hours contracts, short-term employment contracts, etc. In other words, there is great mobility and variety among workers, which makes it difficult to produce figures per category. In addition, some jobs are very temporary or so limited in terms of size or revenues that it is questionable whether they end up in the statistics. Platform work, which sometimes involves jobs of only fifteen minutes or one hour, is by definition not very transparent about revenues and contributions.

Each worker who physically or digitally crosses the border may become subject to another national social security system, as laid down in the Coordination Regulations (EC) 883/2004 and 987/2009. The current rules, however, still assume physical presence at a workplace. Both national law and the

<sup>291</sup> Trouw, 'Digitale nomaden: overal thuis', 31 March 2018.

European Coordination Regulations rely on physical movement and presence when determining the applicable social security law.

Current Dutch social security legislation, labour legislation and tax legislation are facing qualification problems and enforcement issues. Especially pseudo self-employment, which is not a legal term by the way, and non-standard work situations stand in the way of a smooth labour market that is transparent about social protection. First of all, the legal classification is unclear to workers themselves: are they employees or self-employed workers? And what are the implications for social security protection? In addition, clients are often uncertain about how to classify non-standard workers and about the steps they can or must take concerning social security protection: are they dealing with an employee or a self-employed worker? And which obligations does a client have toward the workers? Thirdly, it is not clear to the government who are active in the labour market under which status. Are platform workers employees or self-employed workers? And are the many temporary contractors sufficiently protected against social risks?

The Dutch government is aware of these pressing issues surrounding non-standard work situations. This is apparent from the Coalition Agreement<sup>292</sup> and from the fact that Minister of Social Affairs Koolmees tasked the Parliamentary Committee on Social Affairs with organising a hearing/round-table discussion entitled 'Working in the platform economy' on 16 November 2017'.<sup>293</sup>

In recent years Europe has been initiating proposals and plans that emphasize the importance of the developments in the (European) labour market as well as the need to counter the abuse of, suppression of or exclusion from social protection schemes. One of the recent proposals, for example, is the proposal that recommends social protection for all workers.<sup>294</sup> This European initiative is based on principle 12 of the European Social Rights pillar<sup>295</sup> and thus aims to offer adequate social protection to workers, regardless of the nature and the duration of their employment relationships. As such, this proposal is definitely aimed at atypical workers and self-employed workers.

In addition, the European Commission launched a proposal for a Directive on transparent and predictable working conditions in the EU.<sup>296</sup> European Commissioner for Employment, Social Affairs, Skills and Labour Mobility Thyssen stated about this proposal: *'With today's proposal we are taking action to improve transparency and predictability of working conditions. The world of work is changing fast with a growing number of non-standard jobs and contracts. This means that more and more people are at risk of not being covered by basic rights anymore, starting from the right to know the terms under which they work. Increased transparency and predictability will benefit to both workers and businesses.'*<sup>297</sup>

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<sup>292</sup> 2017 Coalition agreement, 10 October 2017, *Vertrouwen in de toekomst*, pp.22-26.

<sup>293</sup> 'Werk in de platformeconomie' round-table discussion, 16 november 2017, Dutch House of Representatives. See also [www.tweedekamer.nl](http://www.tweedekamer.nl).

<sup>294</sup> European Commission, 13 March 2018, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, COM(2018) 132 final.

<sup>295</sup> The European Pillar of Social Rights, COM(2017) 251.

<sup>296</sup> European Commission, December 21, 2017 Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, COM(2017) 797 final.

<sup>297</sup> European Commission press release of 21 December, 2017, accompanying the proposal for this Directive, COM(2017) 797 final.

The proposals or communications issued by the European Commission on better social protection or transparent working conditions have no legislative or mandatory character. Coordination Regulations (EC) 883/2004 and 987/2009 do legal force but, unfortunately, fail to mention atypical workers. Social security regulations are still mainly based on the work-state principle, and it is still difficult to apply the current designation rules in the Regulations to atypical workers. In short, the existing legislative frameworks offer inadequate or varying degrees of protection to certain categories of workers. The workers affected are hybrid workers, i.e. workers who sometimes have one status, sometimes another and sometimes multiple statuses at the same time: those of employee, self-employed and public servant; the economically dependent self-employed, who actually have only one or two clients and are thus approaching employee status; the temporary contractors who, voluntarily or not, alternate between short, intermittent working relationships and sometimes find themselves in a legal vacuum when in between jobs; as well as workers who alternately work in their country of residence and state of employment.

Neither the Dutch nor the European legislation has been properly fleshed out to cover the potential cross-border nature of teleworking. This not only limits the legal certainty of employers and employees, it also hinders the free movement of persons. Striving for a national work situation is, after all, easier, clearer and more efficient for employers, employees and governments (e.g. tax authorities, social security bodies). National legislation would apply without debate and there would be no need to heed the shift in applicable social security legislation for employees who had worked on the other side of the border a bit 'too much', thereby activating European law.

The Regulations expressly stipulate that the applicable social security legislation cannot be chosen by the parties involved (employers, workers, self-employed workers, public servants, agencies, etc.) but is designated by the conflict rules of Title II of the Basic Regulation, i.e. the designation rules have exclusive effect. Indeed, this is often the most appropriate solution for standard workers. The Member State where most of the work is done is almost always the starting point for applicable legislation.<sup>298</sup>

Employers and employees (usually) also embrace these rules in standard work situations. Sometimes, however, the rules are inadequate or no longer adequate, and non-standard work situations are increasingly common.<sup>299</sup> While some of these situations dovetail nicely with the work-state principle, a concrete situation may sometimes require derogation from this work-state principle, creating difficulties for employers and employees while applying the, then mandatory, country-of-residence principle. The bottlenecks are obvious in the cases of teleworking or working from home in another Member State. Although teleworking has already been identified as a bottleneck under theme 3, it is a bottleneck under theme 1 (European integration) as well.

Given their commitment to the country of employment and their preference for a clear and transparent legal situation, employers and employees both usually prefer application of the work-state principle, as laid down in Article 13 of Regulation (EC) 883/2004, to teleworking that also allows employees to work from home (in another Member State). In these situations, the main seat of the company is considered leading in the application of the work-state principle. Correct application of

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<sup>298</sup> There may be exceptions to this rule, for example, for public servants, soldiers, non-active persons, ...

<sup>299</sup> For examples, see the Introduction.

the current European legislation (Council Regulations (EC) 883/2004 and 987/2009), however, implies looking at the number of substantial activities performed in the country of residence. The criterion in Article 13, paragraphs 1 and 2 of the Basic Regulation and Article 8 of the Implementing Regulation is based on physical presence during the implementation of (substantial) work. In other words, the applicable legislation may shift from country of employment X to state of employment and residence Y if a company allows its employees to work from home as part of modern management and maintaining a good work-life balance. It is currently (still) essential that employer and employee are both well aware of the maximum number of hours to be worked from home, as the work-state principle will give way to the state-of-residence principle even slightly above that number. This means that employees who work from home for one out of 3 or 2 out of 5 days, for example, will no longer be covered by social insurance under the legislation of the state where their main workplace is located or where their employer is based, but that the legislation of the country of residence will be (or become) the applicable social security legislation instead. This is an issue, particularly for companies with many cross-border workers. This anomaly thus burdens some companies more than others, particularly those in the border regions or those (outside the border regions) that employ cross-border workers.

#### **4. Evaluation of the theme of sustainable/socio-economic development**

Evaluation of the sustainable and socio-economic development requires figures on the number of workers (not) subject to the Coordination Regulations. This in fact requires the collection of figures on all cross-border employment of atypical workers. In addition, given the heterogeneity of the group of non-standard workers, it is impossible to draw meaningful comparisons with standard workers or even to draw any general conclusions. There are large differences between Member States, regions, sectors and even generations in the prevalence of 'non-standard forms of work' and 'self-employment'.<sup>300</sup>

The European Commission does, however, offer some indication of the relative share of these workers compared to all workers in the labour market in figures of 2016: 14% of workers in the EU are self-employed; 8% are full-time temporary workers, 4% part-time temporary workers, 13% part-time employees on a permanent contract and 60% are full-time employees on open-ended contracts.<sup>301</sup>

The standard working relationship, i.e. a full time, open-ended employment contract, is still by far the most common employment relationship within the European Member States. There is no ignoring the rise of the new forms of work and labour agreements, though, such as on-demand work, irregular part-time work, voucher-based work, platform work, (pseudo) self-employed work, etc.<sup>302</sup> This evolution in the last 20 years will pose a threat to the long-term social and economic sustainability, and thus the financial sustainability, of our social security systems.<sup>303</sup>

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<sup>300</sup>European Commission, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, pp.3-4.

<sup>301</sup>European Commission, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, p.3.

<sup>302</sup>European Commission, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, p.2.

<sup>303</sup> See also Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, pp.1 -2.

There are currently no figures available to support whether atypical working relationships are hindering or promoting the sustainable economic development of the border regions. The question is whether this will be measurable in the future as the group of non-standard workers is so diverse and sometimes even invisible in the statistics. These figures will not always correspond to reality, especially those on short-term jobs (the gig economy is on the rise) or combination jobs.

Coordination Regulations (EC) 883/2004 and 987/2009 on social security offer no direct support for sustainable development in the border regions as social security legislation remains a national competence and responsibility, only subject to the rules of the Regulations in cross-border situations.

## 5. Evaluation of the theme of Euregional cohesion

The Euregions are subject to the same coordination rules as the other regions of the EU. In other words, the designation rules of the social security Regulations apply as soon as a cross-border work situation arises, regardless of the regions or Member States involved. The exact nature and location of this cross-border element are not important. The country of employment and country of residence may thus be different countries, but there may also be two or even more countries of employment involved, as well as one or more employers. In short, as among the group of non-standard workers, there is great variation here too.

Articles 11 and 13 of the Basic Regulation determine which national social security legislation is applicable in any particular cross-border situation. In this sense, (the designation rules of) the Regulations do not affect Euregional cohesion directly. It is possible, however, for Member States to collaborate closely and possibly even conclude bilateral or multilateral agreements supplementing the current regulations. The underlying principle of the free movement of persons must of course be respected and any barriers to this freedom must be removed. The additional collaboration thus sought and agreed on by Member States cannot alter the existing coordination principles, such as the export of benefits, the aggregation of time periods, the removal of the residency requirement and the option of cross-border healthcare.

Nor is the highly relevant *determination of the applicable legislation* principle negotiable. This means that the relevant parties must apply the designated social security legislation, even in cross-border situations where it is not the most logical or most practical legislation. The only way to escape the designated legislation is to shape the actual situation in such a way that the designation rules point to another applicable social security legislation.<sup>304</sup> Concrete examples may clarify this:

One example is that of a large company in the Dutch border region that also employs workers from Belgium and Germany. Given its international character and the language skills of its staff, this company likes to work with different nationalities. This company struggles, not with its employees or

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<sup>304</sup> For the sake of completeness: Article 16 procedures (see Art.16 of EC Regulation 883/2004) are also used sometimes to achieve derogation from the appropriate legislation. This means, however, is reserved for exceptional situations beyond the scope of this contribution.



Dutch legislation, but with European legislation: the cross-border work situation within the company causes the applicability of Regulations (EC) 883/2004 and 987/2009 to the many employees who live outside the Netherlands. As a consequence, Articles 11 and 13 of the basic regulation, in particular, are used to determine the applicable social security legislation. If there is only one country of employment involved, i.e. the Netherlands, there is no problem and Dutch social security will be applicable to this work situation (pursuant to Article 11 Basic Regulation). If employees may, can, or must work from home as well, there are two work states: the Netherlands and Belgium (or Germany or any other country of residence, for that matter). This would lead to the invocation of Article 13 Basic Regulation, which obliges employees and employers to consider the amount of work performed in the country of residence. If this amount is substantial, the legislation of the other country, i.e. country of residence Belgium or Germany, replaces that of the country of employment as the applicable legislation. The definition of 'substantial' has been laid down in the Regulations (see Article 13 basic Regulation and Article 14(8) Implementing Regulation). In short, Dutch social security legislation is replaced by the relevant Belgian or German legislation if a person performs 25% or more of his work (expressed either in amount of time or remuneration) in the country of residence. This means that working from home has consequences for both employers and employees, as the physical work environment remains decisive in the Regulation, even if employees are constantly connected with their employers via digital work environments.

Another relevant issue in this case is that this employer seeks to give all employees the same administrative treatment and insure them under the same social security legislation, a desire not only driven by administrative convenience, but also by support for the notion of equal treatment; he simply wishes to treat all employees who are doing the same work in the same way. The situation is further complicated by his wish to meet the desire for more flexible working, which has recently turned into a legal obligation.<sup>305</sup> Employees must be granted permission to work from home more often under certain conditions (see the *Wet Flexibel Werken* - Flexible Work Act). This employer wanted to offer the option of working from home anyway because the nature of the work (teleworking) allows it. At the same time, however, he aims for the equal treatment of all employees and the application of Dutch social security legislation. This in fact implies that too much working from home must be avoided and employees are required to travel to the Netherlands to carry out work because, as mentioned above, the current Regulation is still based on physical presence. The balancing act that this employer is thus forced to perform is not conducive to European integration or Euregional cohesion.<sup>306</sup>

A second example is that of the worker who combines two or three part-time jobs, for example, one as on-demand staff, one as a small business entrepreneur and one as a platform worker. These types of situations or variants thereof will become increasingly common and should therefore not be overlooked in the discussion of social security issues. Depending on the legislation in the Member States, 'marginal' work may or may not, for example, lead to periods of insurance, whereby 'marginal work' stands for work that is only carried out for a small number of hours per week/month or that yields only a limited amount of wages or income. Persons in 'marginal' jobs may thus accrue few social

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<sup>305</sup> *Wet flexibel werken* (Flexible Work Act), originally in Stb. 2000, 114 (as amended and applicable since 2016).

<sup>306</sup> For the applicable labour law and social security law, see also M. Houwerzijl, 'Arbeid en arbeidsrecht in de digitale platformsamenleving: transnationale dimensies en dilemma's', *TRA* 2017/59.

security rights or none at all under applicable national law.<sup>307</sup> People who have had 'marginal' jobs for a long time thus face limited or no social security accrual because they have always remained under the threshold that gives entitlement to a regular social security position. People who combine these types of jobs with other short-term or small jobs in other Member States may also face interrupted accrual of social security benefits in the various time periods as it is unclear and unsure whether, where and which social security rights have been accrued and recorded.

## **6. Conclusions and recommendations from a Euregional perspective**

### **6.1 Substantive Conclusions:**

The current rules at national and European level have not (yet) been adapted to the new types of working relationships that are becoming increasingly common in the labour market. In the Netherlands, for example, the debate about the qualification of platform workers is in full swing. Are they employed or self-employed workers? Might this depend on the type of platform as well? Other non-standard working relationships such as on-call contracts, zero-hours contracts and temporary contracts are on the rise and differ from the 'standard' social security structure linked to 'regular' labour relations. Abuse or clever use of the existing rules and the current vacuum lead to undesirable situations of pseudo self-employment, but also of lacking social protection for an increasing number of people. Both young and old, employees and self-employed workers may face changing jobs and working relationships. Sometimes intermittent work can be a nice stepping stone towards another, more permanent working relationship, and sometimes accepting an assignment as a freelancer is a conscious choice. Since the social security positions of an increasing number of non-standard workers are uncertain, unclear and involuntary, however, it warrants the conclusion that the current national legislation needs to be tightened or adapted.

The current European rules also fail in addressing the cross-border work situations of non-standard workers. The rules in Regulations (EC) 883/2004 and 987/2009 are still based on the work situations of decades ago, assuming a long-term relationship with an employer or a self-employed person with a clear and reasonably comprehensive pattern of work activities. One look at the current labour market, however, shows us that today's reality no longer corresponds to this paper reality. The Coordination Regulations deserve a makeover. This makeover does not seem to be in the making for quite some time, however, since the proposed amendments up for debate in 2017 and 2018 are silent on new designation rules for non-standard work situations. The current rules are rigid and not aimed at today's strong and ever increasing labour mobility. National and European law are (still) not suitable for those who opt for (or are sometimes forced into) a combination of jobs and thus non-standard working relationships.

The gig economy that is gaining ground, in any case, does not contribute to the legal certainty of and clarity for non-standard workers, nor does it usually contribute to a decent legal position for these workers, certainly not in cross-border working relationships.

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<sup>307</sup> Franzen judgment, ECJ EU, 23 April 2015, ECLI:EU:C:2015:261.

## **6.2 Outlook**

This cross-border impact assessment has identified the bottlenecks for non-standard workers who work across borders, either physically, by moving between several Member States, or via online activities, such as platform work or teleworking. Although no figures on the exact size of this type of work are available, it is possible to obtain an overall picture of the rules that are lacking and the ones that are overly restrictive. It is important that future research continue to monitor and evaluate the various initiatives at national and European level. Reports such as this one can contribute to the debate about and development of better legal frameworks for the social security of non-standard workers.

### 3.6 Student dossier: The potential effects of the ‘Experiment gesloten cannabisketen’ on the Euregions Meuse-Rhine and Rhine-Meuse-North

Saskia Marks

Gaia Lisi

Floor van der Meulen

Calumn Hamilton

Castor Compoj

On October 10 2017, an unprecedented Pilot Project with the name “Experiment gesloten cannabisketen” was presented in the Netherlands. The coalition agreement introduces the Pilot Project to address the current backdoor-problem. It comes with the scope of studying the effects of a potential legalization of the production of cannabis in particular on the reduction of crime and on decreases in adverse health effects from consuming low-quality marijuana. The Pilot Project consists of an experiment in which the cultivation of cannabis will be decriminalised within strict parameters and a finite, prespecified timeframe. This will take place in 6-10 municipalities in the Netherlands in a time-span of 4 years. The precise wording of the coalition agreement, in English, is as follows:

*“The government will introduce legislation, if possible within six months, on uniform experiments with tolerated cultivation of cannabis plants for recreational use. The experiments will be carried out in six to ten large and medium-sized municipalities, with the aim of determining whether and how controlled cannabis can be legally supplied to coffee shops and what the effects of this would be. After these experiments have been independently evaluated, the government will consider what action to take.”*

This study provides an ex-ante impact assessment of this Pilot Project on two Euregions. The geographical focus of the demarcated Euregions is formally known as Meuse-Rhine and Rhine-Meuse-North. The main findings can be categorized under three different themes, which are respectively European Integration, Sustainable/ Socio-economic development and Euregional Cohesion.

With regard to the theme of European Integration, it can be put forward that the Pilot Project will not further the goals of free movement under European Union law. The fact that specific municipalities will be selected into the Pilot Project could be regarded as a form of indirect discrimination among individuals providing services, as protected by European Law under Articles 49 and 56 TFEU. However, because there appears to be valid reason for the violation of EU law (i.e. reducing organized crime and improve the quality sold in coffeeshops), the new legislation could be justified upon the rule of reason. The cultivated cannabis cannot be exported freely and the selection of cultivators could therefore potentially infringe on the freedom of establishment and the freedom to provide services.

The analysis of potential impacts such a policy could have on a Euregional macroeconomic level is crucial to the scope of this impact assessment. While decriminalizing the production of cannabis itself could already at the national level have a strong impact on employment trends and tax revenue, the effect could be further amplified in the Euregion Meuse-Rhine and Rhine-Meuse-North due to its proximity to the neighbouring countries Germany and Belgium. In the Euregion in particular, a

decrease in drug tourism and nuisance deriving from these countries' nationals is being aimed at by participating in the pilot project. Although drug nuisance in the city of Maastricht has been decreasing over time from 58 to 39 percent, it still remains relatively high in the Netherlands.

At the level of Socio-Economic development, the new legislation is likely to be beneficial. In 2015 alone, almost 6000 illegal cannabis plantations have been seized all across the Netherlands which according to the Dutch police was estimated to be only one fifth of the total. Since 6.55 percent of the population in the Netherlands live in the Euregion, this would imply that almost 2000 cultivators are operating in the Meuse-Rhine and Rhine-Meuse-North Euregions, assuming that the level of illegal cannabis cultivation and associated revenues in the Netherlands is independent of the geographic location. This, together with a CBS estimate of €450m for illegally produced marijuana in the Netherlands, or proportionally €29.5m in the Euregion, would imply that an upper bound estimate of €100m per annum is set for potential tax revenues from the decriminalisation of marijuana production in the Netherlands, proportionally €6.55m in the Euregion. Additionally, were the cultivation of cannabis to become tolerated under Dutch law, this would make a yearly contribution of €6000-8000 for every worker active in the cannabis production industry, provided that these currently produce a value added which is close to average in the Dutch economy.

With regard to the theme of Euregional cohesion it was established that in the jurisdictions concerned (the Netherlands, Germany and Belgium) the cultivation, trade, sales and consumption of cannabis are illegal, although all of these jurisdictions tolerate the possession and cultivation of cannabis in small amounts. The discrepancies between the different legal frameworks will now only become larger due to the Pilot Project. In addition, the Pilot Project tests the limits of obligations under the international legal framework by enabling the cultivation of cannabis on a larger scale. However, the potential incompatibility with international obligations is mitigated by the experimental and temporary character of the experiment. Finally, the paper identified an increased likelihood that Belgium and Germany step up border controls to combat illegal cultivation and trade of cannabis.

It is therefore clear that, although it forms only a national cannabis policy, the Pilot Project has the potential to impact the Meuse-Rhine and Rhine-Meuse-North Euregions both in terms of European Integration, Sustainable/socio-economic development, and Euregional Cohesion.

## **Annex – The ITEM Cross-border Impact Assessment as a Basis for Action: Looking Back at the Follow-up Activities of the 2016 and 2017 ITEM Cross-border Impact Assessments**

One of ITEM's core tasks is to carry out yearly cross-border impact assessments. With these assessments, ITEM strives to give insight into the effects of new legislation and policy on border regions and how existing law and policy affect border regions. Since its inception in 2015 ITEM has successfully concluded three such impact assessments, the latest of which you are now reading. The successful completion of these Cross-border Impact Assessments is for the most part due to the efforts of the Maastricht University researchers involved resulting in valuable research on the effects of legislation and policy on border regions.

However, the impact and success of the ITEM Cross-border Impact Assessments is not exclusively limited to providing a useful contribution to the scientific debate surrounding border regions. ITEM's impact assessment targets policy makers at the regional, national and European level who make decisions concerning border regions. The Cross-border Impact Assessment contributes to the political debate by supporting the identification of existing or future border effects. In this context, the 2016 and 2017 reports have proven to be able to provide a solid basis for further action and research aimed at improving cross-border mobility.

For example, the 2016 ITEM Cross-border Impact Assessment Dossier on Social Security led to the organisation of an Employer Symposium in cooperation with the Holland Expat Centre South, Grensinfopunt Maastricht and City Deal Eurolab. The same dossier also resulted in an expert workshop on the Commission's proposal amending Regulations 883/2004 and 987/2009 in Brussels. At the same time, Dossier 2 of the impact assessment led ITEM to initiate a feasibility study for a cross-border professional recognition card.

The 2017 assessment has proven to be able to form an even broader basis for action. Again, the Dossier on Social Security led to follow-up actions. ITEM provided input to the European Parliament rapporteur on the Posted Worker's Directive. The Dossier on the German car toll for passenger cars was picked up by the media and led to a radio interview with Dutch radio program 'BNR Spitsuur'. Moreover, the dossier was also mentioned in the impact assessment conducted by Ecorys that was commissioned by the Dutch Ministry of Infrastructure and Water Management. The legal analysis included in the ITEM Cross-border Impact Assessment Dossier on the German car toll partly contributed to the decision of the Netherlands to join Austria in a claim against Germany before the Court of Justice of the European Union.

Nevertheless, not only the dossiers of the ITEM Cross-border Impact Assessments have been cause for follow-up actions, the methodology employed in the impact assessment also gained publicity. For example, the methodology employed by ITEM and its researchers was labelled as a best practice by the European Commission's Directorate-General for Regional and Urban Policy (DG Regio) in its communication *Boosting growth and cohesion in EU border regions (september 2017)*. The recognition gained by ITEM led to further cooperation between the Expertise Centre and the European

Commission. In particular, ITEM is cooperating with DG Regio on the development of a European cross-border impact assessment methodology.

Furthermore, the methodology employed in the ITEM Cross-border Impact Assessment as well as the findings emanating from its individual dossiers were presented at several events throughout 2017. Presentations were provided, among others, at the conference of the European Council of Spatial Planners in Budapest, at a meeting of the Dutch GROS Network, at a gathering of Euregion directors, at the launch of the European Commission's boosting growth initiative, at a conference organised by the Euroinstitut, at a meeting for representatives of the Belgian Province of Limburg, at a meeting with the German Ministry of foreign affairs, and at meetings with members of the Dutch Senate and the Provincial Council of Limburg (NL).

Apart from presentations on the ITEM Cross-border Impact Assessment methodology and content, ITEM also promotes the exercise of impact assessments in general. Being an avid supporter of regular, border-specific, bottom-up impact assessments, ITEM has voiced its support and expressed the need for more cross-border impact assessments to be carried out in the Netherlands at several Dutch Ministries.

Finally, ITEM is increasingly devoting attention to the ex-ante identification of border effects of proposed legislation and policy. In order to determine whether a rule or measure has a certain effect on border regions, ITEM has introduced a quick scan. This initiative employs its own methodology and may be applied to estimate to what extent a certain topic will require further assessment as far as border effects are concerned. In 2017, two quick scans were conducted by ITEM. Whereas one of these quick scans focused on examining the Dutch Coalition Agreement, the other explored the border effects of the increase of the low VAT tariff in the Netherlands. As this year's Cross-border Impact Assessment shows, two themes from these quick scans (i.e. the increase in the low VAT tariff and the experiment concerning legal cannabis cultivation) were indeed taken up in dossiers.

Looking to the future, ITEM is dedicated to continue to map the effects of international, European, national and regional legislation and policy in its Cross-border Impact Assessments. The Expertise Centre furthermore intends to develop its impact assessment and quick scan methodologies further and is looking forward to doing so in cooperation with its partners, stakeholders and researchers.

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