

# Capital 6

## Closing assessment and overview of recommendations

Cross-border workers face a number of problems. This report focuses on the problems arising in the field of fiscal and social insurance law. There is no such thing as the cross-border worker. This means that in many cases, customised solutions are required. We are aware that social insurance law is not a field that occupies tax consultants every day. We sincerely hope that the report will lead to a lively discussion at the meeting of Association for Tax Science and express the hope that a number of recommendations will ultimately lead to improvements in the position of cross-border workers. In the interests of transparency, the recommendations are presented per chapter below.

### *Chapter 1*

#### ***Information provision***

1. Cross-border workers deserve good provision of information at the individual level ('border transparency'). As cross-border workers have to deal with at least two states, the competent authorities such as tax authorities, social insurance institutions and employment services should (physically) work together on a bilateral basis. A good example of cross-border cooperation is the Cross-Border Work and Enterprise Team, in which the Dutch, German and Belgian tax authorities are represented.

#### ***Border effects test***

2. Just as at the EU level, in the realisation of legislation and administrative procedures, both the legislative and the implementing organisations must, as a standard, conduct a (border) effects test.

#### ***Double economic levy***

3. In the draft Directive on avoidance of double taxation, in addition to the prevention of double taxation, the EC must also devote attention to the prevention of double economic charges. The advantages and disadvantages of these double economic charges for both cross-border workers and for member states must be investigated.

***Correct statistical data on border traffic***

4. In order to obtain an accurate picture of the (border) effects of legislation and administrative procedures, it is important that accurate data on cross-border workers are available. Eurostat, for example, has no precise figures for cross-border workers. Eurostat and national statistical organisations must gather statistical data on the basis of a uniform definition of 'cross-border worker', which covers both employees and the self-employed.

***Chapter 2******Prevention of double taxation and free movement of persons***

5. Ideally, an additional article to Article 48 of the Treaty on the Functioning of the European Union (TFEU) could be formulated. 'After consulting the European Parliament, the Council will unanimously adopt, according to an ordinary legislative procedure, the provisions relating to the prevention of double taxation, in as far as these are necessary to facilitate the freedom of movement of persons who live in one member state and work in one or more member states, and to realise consistency with the measures referred to in Articles 45 and 48 of the TFEU. If a member of the Council declares that a subject of legislative action, as referred to in paragraph 1, could harm important aspects of its fiscal system, in particular its field of application, costs and financial structure, or could have consequences for the financial balance of that system, it may request, stating well-founded reasons, that the matter be presented to the European Council.

In that case, consultations will take place with that member and the ordinary legislative procedure will be suspended. Following discussions, the European Council shall, within four months of that suspension:

- a) refer the matter back to the Council, as a result of which the suspension of the ordinary legislative procedure will be terminated, or
- b) will take no action or request the Commission to submit a new proposal; in that case, the original proposed action will be deemed not to have been adopted.'

***Letting third country nationals work as cross-border worker***

6. We recommend the inclusion in Article 79(2)(b) of the TFEU that subjects of third countries legally residing in a Member State as cross-border workers may work in another Member State.

### Chapter 3

#### **Effort obligation for authorities in relation to place of residence**

7. The Dutch government should lay down in law that a person cannot have two places of residence for the purpose of the application of Dutch fiscal and social legislation.
  
8. For the determination of the place of residence, there is a need in practice for uniformly formulated criteria. The Dutch government and the EU must therefore make efforts to clearly establish in legislation which elements are of decisive importance in the determination of a person's place of residence. Ideally, the determination of the place of residence should be the same for the levy of both taxes and social insurance premiums. There should be just one place of residence within the EU. In cases in which member states have a difference of opinion regarding the place of residence, Article 11 of Regulation 987/2009 should be leading for the purpose of taxation and social insurance. In the case of migration, it should not be possible for natural persons to register in a personal records database of one Member State if they have not yet de-registered from the records of the original Member State.

### Chapter 4

#### **Convergence of taxation and social insurance charges**

9. When working in a different country, the authorisation to tax income from non-self-employed work on the basis of the '183-day rule - which has a further two additional requirements - is assigned to the state of employment if work is performed there on more than 183 days per year. In other cases, the law of the state of residence applies. In the case of secondment in compliance with Article 12 of Regulation 883/2004, the insurance and premium obligations are assigned to the seconding state for a term of two to five years. In the case of temporary work in a state other than the normal state of employment, the insurance and premium obligation will diverge from the tax liability after 183 days. This leads to undesirable (administrative) effects for migrating workers.

In the tax treaty with Germany, a choice was made for the state of residence to prevail for all levies for persons who work on cross-border business locations (see Article 14(3) of the 2012 Dutch-German Treaty).

We recommend that this solution be raised to the level of general policy in negotiations on treaties to avoid double taxation and to expand it to cover all situations. In the case of secondment, the insurance obligation period should be reduced to 12 months and the tax liability period should be increased to 12 months. This would concentrate the levy of tax and social insurance premiums in a single state.

***Multi-disciplinary approach***

10. Social insurance experts should also be involved in negotiations on tax treaties, with the aim of the allocation rules in (international) social insurance regulations 'converging' with those in tax treaties.

***Simultaneous equal treatment in the state of employment and the state of residence, and compensation***

11. For cross-border employment, equal treatment in the state of employment should apply, which means, among other things, equal payroll costs and equal gross or net salaries. If disadvantages arise in the state of residence in comparison with the neighbouring state, in the first instance these should be compensated by the state of residence. At the EU level, the aim should be a general compensation regulation for citizens. Ideally, the EC should issue a Directive providing that the member states are required to implement an (optional) compensation regulation in the national legislation of the state of residence if substantial disadvantages arise as a result of cross-border employment. This can be combined with macro-economic settlement at the EU level, in the same way as the Netherlands already does in its relationship with Belgium.

***Clarification of exclusive effect***

12. The Dutch government must make efforts to create clarity on the concrete significance of the provision that only one legislative regime applies to a person, as now provided in Article 11(1) of Regulation 883/2004. One possibility for removing the uncertainty that has arisen is to state the regulations for which the exclusive effect applies in full in an appendix to the Regulation. An alternative solution could be to provide in the Regulation that where the principle of exclusive effect does not apply, social insurance contributions may be charged by the member state in which the person concerned is not subject to its legislation but is required to pay benefits.

***Change in the legal force of the A1 statement***

13. With regard to the A1 social insurance statement, the recipient member state should be given more control powers and obligations.

***Employer's information obligation for A1 statement***

14. The seconding member state should state the amount of the gross salary that the seconding employer pays the seconded employee in the A1 statement. In addition, information should be provided in the statement on the state to which taxation is assigned. However, this information is not binding. If the facts prove to be different after the event that those on which the statement is based, that statement will be withdrawn in relation to the taxation. For the verification and control of A1 statements, the body competent for social insurance in a member state must have access to the data that an employer is required to provide in relation to Directive 2014/67/EU.

***International road haulage***

15. For international road haulage, both the taxation and the social insurance obligation should be based on the principle of the employer's country of residence or registration, with the interests of the employee taking priority. The advantage of the allocation to the place of residence or registration of the employer is that the administrative costs for the employer and the employee are relatively limited. It would be possible to match this to the transport licence.

***Teleworking***

16. With cross-border work, the issue in the allocation of the tax liability is the 'physical presence'. However, this criterion offers no solution with the phenomenon of teleworking, which is growing in view of the technological developments that make it possible to work at home. We recommend that the levy of tax and social insurance premiums be coordinated for teleworking.

***Professors' provision in some Dutch tax treaties***

17. The 'professor's provision' of Article 20 of the 2001 Dutch-Belgian Treaty, among others, provides that for the first two years, the right to levy tax is granted to the state of residence. Regulation 883/2004 grants the levy of social insurance premiums to the state of employment. As a result, the levy of tax and social insurance premiums are not synchronous. The 'professors' provision' should therefore be withdrawn.

***Enforcement Directive for seconded employees, remuneration of seconded employees***

18. In the Working Conditions of Seconded Employees in the EU Act, the way in which payroll tax is deducted from the salary of seconded employees should be included in Article 8 and evidence of whether and where payroll tax is deducted should be included in Article 9.

***Cooperation of (foreign) authorised bodies on deduction***

19. The services of the Social Insurance Bank (SVB) offices for Belgian and German Affairs should be expanded to enable employers to deduct their foreign social insurance premiums via these offices. These SVB offices must cooperate with the competent German and Belgian bodies in that regard.

**Substantial work**

20. Article 13 of Regulation 883/2004 refers to ‘a substantial part of the work’ (25%). The application Regulation refers to ‘a (...) substantial part of all work in paid employment or other than in paid employment’. In the various sections of the Practical Guide too,<sup>867</sup> the description of ‘a quantitatively substantial part of all work’ is used. With regard to the question of whether a person performs substantial work in the member state of residence, times in which work is performed outside the Union must also be considered in as far as it follows from the jurisprudence of the Court of Justice that Regulation 883/2004 applies to these times. Work performed outside the EU for an employer established outside the EU will then be disregarded.

**Formal/material employer**

21. For the application of taxation and the levy of social insurance contributions with regard to the provision of employees, a uniform definition of ‘employer; should be used in order to reduce the administrative costs.

**Social dumping**

22. ‘Social dumping’ is not interpreted in the same way by all member states. The newer member states, in particular, treat this more liberally than the old member states. See, inter alia, the Bogdan Chain ruling. In such cases, it is claimed that the seconded person is subject to a financially attractive social insurance regime and/or tax regime (usually for the seconding party). There are often artificial constructions in which the facts and circumstances leading to the designation of these systems are faked or have no real significance (Plum ruling, Cypriot payroll construction with truck drivers). The term ‘social dumping’ should be defined at the EU level. It is proposed that, if one of the competent institutions of the member states concerned suspects ‘social dumping’, the competent institutions (labour and social insurance law and tax law) should be required to consult each other on this. A provision enforceable in law should be included in Regulation 987/2009 for that purpose.

**Employment relations and subjected legislation**

23. The Dutch government should make efforts to realise an EU regulation for employees who work in more than one member state, which ensures that they become subject to the legislation of the member state with which their working relationship has the closest affiliation.

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<sup>867</sup> Practical Guide on the applicable law in the European Union (EU), the European Economic Area (EEA) and Switzerland, December 2013.

## Chapter 5

### **Child allowance**

24. The Dutch government can compensate an unequal allocation for those who happen to be insured on the reference date and those who are not by creating scope in national legislation for persons who, pursuant to the Regulation, are subject to Dutch law but are not insured for child allowance on the reference date of a quarter.

### **Proposal for new Article 13(4)bis of Regulation 883/2004**

25. We take the view that the proposed addition of Article 13(4bis) of Regulation 883/2004 should be: 'Those who receive unemployment benefits in one member state and at the same time perform work in another member state, in paid employment or otherwise, are subject to the law of the member state in which the work is performed'. We recommend that the state of employment principle be applied, and not the state of residence principle proposed by the EC.

### **Investigation of position of treaty-entitled family members**

26. We recommend further investigation of the position of the inactive family members (parties entitled under the treaty) of cross-border workers (principal insured party) working in the Netherlands with regard to:
- the global cover (urgent medical care during holidays);
  - the legal possibility of contracting supplementary insurance in the Netherlands;
  - the possibility of insurance by the Dutch health insurer of the active cross-border worker.

### **Investigation of taxation with financing of performance in the event of illness**

27. We recommend that pursuant to Article 4(3) of the Maastricht Treaty and Article 45 of the TFEU, the EC investigates the EU's possibilities for providing that member states must omit fiscal charges for the financing of performance in the event of illness if the pension beneficiary owes premiums or contributions, or similar deductions in another member state for receiving such performance. A new third paragraph could be added to Article 30 of Regulation 883/2004. This could be 'If a pension beneficiary, in the cases referred to in Articles 24 and 25, owes substantial fiscal charges in the member state in which he resides, the part of these charges levied for financing and acquisition of performance in the event of sickness and of maternity benefits and equated paternity benefits cannot be collected if the pension beneficiary owes premiums or contributions or similar deductions in another member state for obtaining such performance.'

**Performance with long-term care**

28. We recommend that, in view of the specific 'state of residence' character of these benefits, the member state in which the person concerned resides be given sole authorisation to award benefits in cases of long-term care. In order to realise transitional rights for existing cases, the following provision should be included in Article 87 of Regulation 883/2004: 'If a person residing outside the authorised member state on 31 December 20xx is entitled to benefits for long-term care, these benefits will be regarded as sickness benefits for long-term care'.<sup>868</sup>

**Status of person entitled under the treaty**

29. We recommend that (corporate) surviving dependants' pensions be added to the list in Item 1(f) of Appendix XI, Netherlands Section of benefits and pensions pursuant to which the person concerned can be qualified as a person entitled under the treaty in the Netherlands, so that they can retain this status as a person entitled under the treaty.

**Dutch-German Tax Treaty 2012: short-term social benefits**

30. We recommend amendment of the Dutch-German Treaty 2012 concerning short-term social insurance benefits. The right of the state of residence (Article 17(1) of the 2012 Dutch-German Treaty) to charge cross-border workers short-term social insurance benefits associated with the work during the employment contract should be abolished. The allocation of taxation of these benefits (e.g. sickness benefits and paid parental benefits) to the state of employment avoids the employee who retains social insurance in the country of employment from being temporarily taxed in the country of residence.

**Labour law and social insurance law in the event of illness: convergence of the obligation to continue payment of salary in Member State A and sickness benefit payments in Member State B**

31. The EC must find a solution for the problems that arise due to the absence of coordination of Regulation 883/2004 and Regulation 593/2008.

**Mutual recognition of disability**

32. We recommend that the Netherlands investigate the possibility of realising mutual recognition with Germany and Belgium of the degree of full and permanent disability.

***Dutch and German disability benefits***

33. We recommend that the 'top-up benefits' problem that arises with benefits under the Dutch Work and Income According to Labour Capacity Act (WIA) in the case of cross-border workers, who receive German pro rata disability benefits after 78 weeks and Dutch pro rata disability benefits only after 104 weeks, be solved through 'automatic' application of Article 23(6) of the WIA. In this simple manner, the Leyman ruling can be implemented, in the spirit of Article 4(3) of the Maastricht Treaty.

***General recommendation on harmonisation of social insurance***

34. The possibility of including a new preamble or general provision in Regulation 883/2004 should be investigated. This could read: 'If, as a result of lack of coordination of social insurance systems, a certain group of persons has significantly lower protection for a certain period than the national citizens in the last state of employment and in the state of residence, while coordination rules cannot solve this situation, the member states concerned should introduce a regulation to anticipate these disadvantages.'

***Social tourism***

35. We recommend that an employee who has always had social insurance in a member state and who works for a short period as an employee in another member state and will consequently receive higher unemployment benefits and/or unemployment benefits for a longer period from that member state can apply for unemployment benefits in that member state only after three months. With regard to the control of social tourism, we support the measure that the EC proposes to grant employees from other member states the possibility of applying for benefits in the state of employment only after three months.

***Coordination of unemployment of cross-border workers***

36. We recommend that Article 65 of Regulation 883/2004 read as follows:
1. Unemployed persons who, while performing their last work, in paid employment or otherwise, in a member state other than the competent member state shall make themselves available to the employment services of the member state in which they reside. They are entitled to benefits pursuant to the law of the member state in which they reside, as if they had been subject to that law during the performance of their last work, in paid employment or otherwise. This performance is provided by the body of the place of residence.
  2. Unemployed persons who, while performing their last work, in paid employment or otherwise, were resident in a member state other than the competent member state and who were subject to the law of the competent member state for at least 12 months/five years, may opt to make themselves available to the employment services of the competent member state. They are entitled to benefits pursuant to the law of the competent member state, as if they resided in that member state. These benefits are paid by the body of the competent Member State.
  3. The choice afforded in paragraph 2 can be exercised only on commencement of the unemployment. The choice can be made once only and is final.
  4. The unemployed persons referred to in paragraph 2 register as job-seekers with the competent employment services of the competent member state, are subject to the controls organised there and must comply with the conditions imposed by the law of

that member state. If they also wish to register as job-seekers in the member state in which they reside, they must comply fully with the obligations applying in that member state.

5. The implementation of paragraph 2 and the second sentence of paragraph 4, as well as the regulations on the exchange of information, the cooperation and mutual award of supplementary benefits between the bodies and services of the member state of residence and the member state where the person concerned last performed work will be laid down in the application regulation.

***Green Paper on convergence of taxation and the levy of social insurance charges on pensions***

37. In cooperation with the Organisation for Economic Cooperation and Development (OECD), the EC should analyse the problem of cross-border pensioners in a Green Paper and provide an initiative for a solution. Better regulation is possible through the application of the integral state of residence principle.

***Codification of social insurance jurisprudence***

38. In view of the influence that the jurisprudence has on the convergence of family allowances, it must be concluded that in terms of family allowances, Regulation 883/2004 has more the character of a Directive than a directly binding treaty text. This does not benefit the transparency of the rights of cross-border workers. From that point of view, the proposal on the level of family allowances made by the EC on 13 December 2016 is not ambitious enough. In consultation with the Administrative Commission, the EC should therefore make a greater effort in the case of family allowances, as well as other matters, to codify jurisprudence in Regulation 883/2004 and Regulation 987/2009.

***Pan-European pension funds***

39. Following Belgium, the Netherlands must enact legislation to attract pan-European pension funds.