Insight stories on cross-border situations
Several blogs on interesting cross-border issues

December 2017

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.
Insight stories on cross-border situations
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Introduction

The Institute for Transnational and Euregional cross border cooperation and Mobility / ITEM of Maastricht University is an interdisciplinary institute that conducts interdisciplinary research within the scope of cross-border mobility and cooperation issues.

Among the ITEM Expertise Centre’s scientific staff are researchers and PhD-candidates with expertise in various fields. Besides scientific output in the shape of publications researchers and PhD-candidates write blog contributions that are featured on the Maastricht University website. This volume comprises of a collection of short pieces about current and interesting topics linked to cross-border matters.

Blog themes include European policy and developments, outside the EU, integration of refugees, cross-border crime, restrictions to EU Citizens and third country nationals, border effects, cross-border pensions and cross-border taxation and social security law

This volume was issued on 4 December 2017, in Maastricht.
Blog theme: European policy and developments

Myth: Brussels imposes nothing but annoying measures

Published on 22 June 2017

From De Observant ‘Mythbusters’ series, written by Cleo Feriks
Mythbuster: Alexander Hoogenboom

During the Brexit campaign, a popular and frequently repeated example of everything that was bad about the European Union, concerned the regulations concerning lawnmowers. The EU doesn’t allow them to be too noisy.

Opponents shout that it is fussing on a postage stamp. As if member states cannot decide that for themselves. Could the EU not address real problems instead?

But this kind of measure ensures that the EU continues to function properly, says Alexander Hoogenboom, law researcher and scientific coordinator at the Institute for Transnational and Euregional cross-border cooperation and Mobility (ITEM).

“The Germans had introduced the decibel regulation in their own country. It turned out that especially foreign lawnmowers did not meet the standards and were therefore no longer allowed to be sold there. In doing so, Germany protected its own market and kept imports at bay. To promote the free market, the EU introduced the measure in the whole of Europe. This type of regulation exists in all large economies. But because the EU often has to go through an extensive legislation process first, it is much more visible.”

Another example is the rates for roaming abroad. These have been abolished since mid-June, and everybody now pays the same across the EU as they do in their home country. At long last, grumble anti-EU citizens. Could that not have been passed through that cumbersomely slow organisation years ago?

“The European Commission (the EU’s civil service) had been working on this since 2007. The EU Parliament had already voted in favour a long time before. It was the member states – represented in the Council of Ministers of the European Union – who were

1 https://www.observantonline.nl/English/Home/Articles/articleType/ArticleView/articleId/12499/Myth-Brussels-imposes-nothing-but-annoying-measures
obstructive. That is why it took so long.” Then why is this not made clear in the news?“National politicians have a much better network in their own country than the EU. They can more easily call someone from the media to present their story. The EU has always been very diplomatic in its actions. They need the member states for further decisions, so they will not easily criticise a country."

Some politicians use this to their advantage. “It sometimes happens that someone cannot get a majority for a measure in their own parliament. They then try to make it European policy. If they succeed, they can say back home: ‘Well, it is Europe laying down the law’."

They also use that sentence when they know that new legislation will not go down well. “Then they complain at home, while those very member states voted in favour in the Council. The United Kingdom was very good at that before the Brexit. When really very few decisions are taken in which the member states don’t have a major finger in the pie.”

Another thing that doesn't do the EU's image any good, is that countries present popular Brussels legislation as their own idea. “The fact that there is a maximum number of hours in a week that you are allowed to work, that web shops are compelled to provide you with the option to return your purchase within seven days, that our tap water must meet certain requirements. This all sounds very Dutch, but it is in fact European legislation. This European ‘origin’ gets lost in news coverage.”

This blog is a repost and part of Mythbusters, a series published by The Observant in which academics shoot down popular myths on complex topics.

Written by Cleo Freriks.

Myth buster: Alexander Hoogenboom, law researcher and scientific coordinator at the Institute for Transnational and Euregional cross-border cooperation and Mobility (ITEM).

Photo © Joey Roberts

2 https://www.observantonline.nl/English/Home/Articles/articleType/ArticleView/articleId/12499/Myth-Brussels-imposes-nothing-but-annoying-measures
Brexit or exit equal treatment?

Published on 25 February 2016

Marjon Weerepas

It can’t have escaped anyone that the United Kingdom is about to hold a referendum on its membership of the European Union. Lengthy negotiations to avoid the secession of the United Kingdom have led to an agreement\(^3\).

One of the items in the agreement is that a Member State may take measures if citizens from other EU Member States put considerable pressure on its social security system (see De Morgen\(^4\) of 20 February 2016). One such measure gives foreign citizens only a partial right to social security benefits/facilities during their first four years of work in that Member State. The measure can be applied for seven years and cannot be extended. It will require the amendment of Regulation 492/2011\(^5\); access to non-contributory, work-related benefits will be limited for said period if necessary. The restriction to non-contributory benefits does not seem insignificant to me, as, otherwise, they would be cheaper again than local workers.

Another measure is the indexation of child benefits exported to a Member State other than the Member State in which the worker resides, i.e. the creation of a link between benefits and the conditions in the child’s state of residence. This will require the amendment of Regulation 883/2004\(^6\) on the coordination of social security. The agreement states that as of 1 January 2020 all Member States will be allowed to extend this indexation to existing child benefits that have already been exported by EU workers. It is noted that the Commission has no intention of extending this indexation to other types of exportable benefits, such as pensions. Hopefully it will adhere to that intention.

In my opinion, all this begs the question of whether this is desirable in the light of said regulations. Regulation 883/2004 is based on Regulation 3/58, one of the oldest Regulations in European law. The social security of workers working in the Economic

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\(^4\) [https://www.demorgen.be/buitenland/wat-houdt-de-britse-eu-deal-nu-eigenlijk-in-b97d1ac5/](https://www.demorgen.be/buitenland/wat-houdt-de-britse-eu-deal-nu-eigenlijk-in-b97d1ac5/)


Community, later European Union, was one of the first elements that required protection in the “early Europe”. The work state principle is an important principle to this end. Foreign employees must have the same rights and obligations as workers who live and work in a Member State. This prevents social dumping and alleviates the fear that the influx of workers from supposedly ‘cheap’ Member States will have an anti-competitive effect in the work state. In addition, export restrictions of social security benefits must be interpreted strictly so far. See also points 17 and 37 of Regulation 883/2004. An important provision is Art. 4 of Regulation 883/2004, which outlines the principle of equal treatment: people subject to the provisions of the Regulation must have the same rights and obligations resulting from the legislation of the Member State as the nationals of that Member State, under the same conditions.

Note that the Regulation has an exclusive effect, pursuant to Art. 11. This means that the legislation of only one Member State is applicable and thus prevails over the legislation of the other Member State. Great power is often attributed to the regulation as a complement to this exclusive effect. This power entails that the legislation of a state, once designated as the applicable law, can make no distinctions according to country of residence or nationality. After all, the exclusive effect would have no effect at all if making such distinctions were possible. The applicable legislation can, however, contain other conditions, for example providing that a person must have been subject to the legislation for at least a certain amount of time. This provision is not discriminatory because it applies to everyone, whether residing inside or outside the Member State. That seems not to be the case for the above measures, however, raising the question whether meeting the conditions of the United Kingdom would open the door for other Member States to impose restrictive requirements of their own. This would probably also mark the end of the above Regulations, which, after all, uphold the principle of equal treatment for foreign workers and self-employed persons. Hopefully, the United Kingdom will remain inside the European Union and the agreement will be taken off the table. Otherwise, this agreement might lead to an exit of equal treatment and thus the erosion of the current Regulations.

Photo © Pixabay Verdeling Brexit

8 https://pixabay.com/nl/verdeling-brexit-groot-brittanni%C3%AB-2941902/
Legitimacy in the political sense can be defined as an inquiry into the justification for the exercise of public authority. Or put differently: it is the reason why I, being part of society, should accept laws and regulations that bind me.

Classically, there are two views on why state action is considered legitimate (described by such thinkers as Fritz Scharpf):

- Input legitimacy reflects the idea that laws and policy are legitimate insofar they correspond to the preferences of those governed.
- Output legitimacy reflects the idea that laws and policy are legitimate where they present effective solutions to problems and challenges common to those governed.

The question of legitimacy is thus intimately bound up with government. A democratic system of government is usually based on the idea of representative democracy. Much simplified this is the idea that at periodic intervals persons are elected to sit in parliament with a view to make law and check the executive. The question remains, however, what the fundamental mission of those representatives is.

A first view would argue that – in line with the input legitimacy view – these lawmakers should reflect on, translate and carry out the preferences of the voters who elected them. In this way, parliament would simply be the voice of the people, an agent so to speak. Elections are there to make sure that agents do not deviate from what the people want.

A second view would argue that elected representatives are not bound to follow voter preferences. As Edmund Burke noted: ‘Parliament is not a congress of ambassadors from different and hostile interests; (...) but parliament is a deliberative assembly of one nation, with one interest (...).’ In this view, parliamentarians act or should act as trustees: acting with the best interest of the trustor in mind when making their decisions. It is about what the people, the nation, needs. The periodic elections are there to either renew that trust, or where voters feel their interests have not been adequately represented.

These two views are, of course, extremes. In practice a representative democracy will always oscillate between the two views. The ‘first view’ is subject to the criticism that the ‘voice of the people’ may be swayed by uninformed, easily swayed by emotion or misinformation, or manipulated by interest groupings. The ‘second view’ may be criticised as ‘elitist’ or paternalist: the idea that someone else should better know ‘what is best’ for
you, better than you yourself. It denies – or so critics would argue – a degree of emancipation and autonomy usually associated with reaching adulthood and the right to vote.

So, in asking the question what is the essence of representative democracy, the question revolves around which of the two guises a representative should primarily adopt. The rise of populist movements across Europe and the United States shows an overall dissatisfaction with idea of a representative democracy whereby parliamentarians are trustees.

This disillusion or distrust was confirmed by two events. First, the referendum in favour of a Brexit, in which a major selling point for the Brexiteers was the greater possibility for self-government without interference from EU technocrats.

Secondly, the US election results of the 8th of November. Here we had two candidates. One generally considered competent, in possession of a law degree and with strong experience in the political machinery, including acting as Secretary of State. Someone you might think could be trusted to make well-considered, informed decisions. The other, a flamboyant outsider who, whatever his (many) faults, was seen as giving voice to a large section of the population which felt disenfranchised in a modern (globalised) society. Someone who was seemingly not afraid to take on the political establishment and act as an agent of the voters, reflecting what they wanted rather than what the establishment thought they needed.

And the citizens of the US picked the latter. It is a victory for the representative as being simply the voice of the people. Trustees are no longer trusted to make decisions that correspond to the voter’s best interest, or are at least failing to adequately explain and justify their decisions to the electorate. Indeed, Hillary Clinton, was seen as untrustworthy one of the two candidates – primarily because she came from, and belonged to, ‘the system’.

Perhaps this upset is a good wake up call for political systems. But consider that the voice of the people can easily become the voice of tyranny – as Alexis de Tocqueville already remarked after the French revolution. The rise of populist movement also brought the rise of fear of the real or imagined ‘other’ (often the migrant), rise of hate crimes and the questioning of principles imbued in constitutions meant to protect fundamental rights (including the right not to be discriminated against). Moreover, the Dutch referendum on the Association Agreement between the EU and the Ukraine showed that interest groupings can easily hijack the public opinion for their own purposes: the organisers of referendum had explicitly and publicly indicated that they did not actually care about the agreement to be signed. Rather, they sought a way to obstruct the EU. And the people followed. Good reasons, therefore, to be concerned with this recent turn of events.

Photo © Trump vs Hillary/ Photo Via, rawconservative.com
Blog theme: Integration of refugees

An investigation into the local practices concerning the integration of refugees in Maastricht

“Integration”... a much disputed concept

Published on 24 July 2017

Harres Yakubi, Mercedes Quammie, Sarai Suárez Louzao, Vienna Kooijman

At present, the Dutch integration policy is based on the Agenda for Integration which was launched in May 2013. According to Hague’s alderman Rabin Baldewsingh (PvDA) the national integration policy of the Netherlands has “failed miserably”, in that immigrants are less involved in society and are mainly living off social welfare benefits.

According to Hague’s alderman Rabin Baldewsingh (PvDA) the national integration policy of the Netherlands has “failed miserably”\(^9\), in that immigrants are less involved in society and are mainly living off social welfare benefits. But how does integration fail and how should it succeed? Whilst there is consent on what integration is: the process by which migrants become accepted into society, this open definition does not provide the grounds for cross-cutting guidelines on how national integration policies should be developed or executed.

At present, the Dutch integration policy is based on the Agenda for Integration which was launched in May 2013. The approach does not target specific migrant groups or countries of origin, but rather employs a more strategic general focus on participation and social diversity. However, the increased influx of asylum seekers in 2015 led to developments in the area of integration of beneficiaries of international protection. As a result of the establishment of a temporary 'Ministerial Committee on Migration', several measures were taken in the dimensions of labour market integration, education and housing.

Amidst discussions on how to improve integration for beneficiaries of international protection, the Migration Policy Group has developed the project NIEM\(^10\). MACIMIDE is the research institute that acts as the Dutch national focal point\(^11\) and currently is gathering evidence to assess how the Netherlands performs in refugee integration, as

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\(^9\) https://nltimes.nl/2017/07/03/dutch-integration-policy-failed-miserably-says-hague-alderman

\(^10\) http://www.forintegration.eu

\(^11\) https://macimide.maastrichtuniversity.nl/citizenship-and-immigrant-integration/
compared to other selected EU countries. Its most recent updates can be accessed in an earlier blog contribution by Dersim Yabasun. Complementary to MACIMIDE, ITEM conducts research within the scope of cross-border Euregional mobility and cooperation issues, focusing on practical solutions for these issues. Their research line focuses on linking immigrants to the province of Limburg.

**Taking integration down to the local level**

While the national government has a coordinating role in the field of integration policies (captured by the NIEM indicators), municipalities are charged with the implementation of such policies and thereby play a crucial role in the practicalities of integration. Therefore, our research attempts to supplement the work of NIEM by capturing the local level practices within Maastricht regarding integration in the areas of education and housing.

Within the educational integration of refugees, our research focused on access to primary, secondary and tertiary education, recognition of prior qualifications, and language learning. Within the housing integration of refugees, access to housing, conditions of housing, and tensions between native and refugee population were the main explored dimensions.

Overall, the attempt was to answer three broad questions:

- What barriers to integration currently exist?
- Are there potential solutions/best practices and what makes them successful?
- Are there best practices in Maastricht that can be adopted by other cities?

**Local level findings**

One of the main findings (also see the full report ‘An Investigation into the local Practices concerning the Integration of Refugees in Maastricht’) relates to the lack of a single actor or institution that comprehensively coordinates respective spheres of integration. Moreover, there is no mechanism that allows for a follow-up and monitoring of refugees in the process of becoming integrated in Maastricht. On the other hand, the vast majority of programs targeted towards improving refugee integration are aimed at young, highly educated refugees. One final salient point is the fact that the target group for these policies, programs and processes, the refugees themselves, are rarely included in the discussion of how to improve integration.

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[https://onedrive.live.com/?authkey=%21AAXhEjIf0rhZmNQ&cid=51F28CA5DBD690CE&parId=51F28CA5DBD690CE%21370&o=OneUp](https://onedrive.live.com/?authkey=%21AAXhEjIf0rhZmNQ&cid=51F28CA5DBD690CE&parId=51F28CA5DBD690CE%21370&o=OneUp)
On a positive note, there have been several grassroots initiatives that have tackled the integration of refugees in a constructive and creative way. Examples of these include the Refugee Project, the Buddy Program and the Match Project. All aforementioned initiatives aim to integrate refugees with locals in order to achieve means including: language learning, knowledge of Dutch society, support in navigating through Dutch organisations, and improved social relationships.

**The future of monitoring integration practises...**

NIEM is designed to be used by civil society organisations and local governments as a political instrument in order to assess the efforts deployed by central governments to coordinate the different actors and to provide them support in the development of their tasks regarding refugee integration. Therefore, a crucial step is to bridge the gap between academia and policy-makers and build up national coalitions in which all kinds of stakeholders can be involved. Following the same reasoning, the findings derived from this research were presented and discussed in an interactive workshop¹⁴ held in Maastricht on the 3rd July 2017, with the attendance of several stakeholders including housing corporations, VluchtelingenWerk, and the municipality of Maastricht.

UM-MACIMIDE will continue to implement the NIEM project for the coming years and therefore will monitor developments in integration policy at the national level. However, the local practicalities pertaining to integration must also be researched and hence incorporated into an accurate and holistic picture of what integration looks like.

**This blog was written by Harres Yakubi, Mercedes Quammie, Sarai Suárez Louzao, Vienna Kooijman and in cooperation with ITEM.**

*Photo © Pixabay 'Integration'¹⁵*

*Photo © Pixabay 'Student computer boy'¹⁶*
Blog theme: Cross-border crime

Is a ban on outlaw motorcycle clubs effective?

Published on 3 March 2017

Kim Geurtjens

In Germany, various chapters of outlaw motorcycle gangs have been prohibited over the last decades. The Netherlands are currently working on a case to effectuate a ban. However, the effectiveness of a ban to tackle (organised) outlaw biker crime remains to be seen.

These days, motorcycle clubs such as the Hells Angels are associated with disturbances of public order, e.g. public drunkenness, intimidating presence and assault on the one hand, and with cross-border organised crime such as the trafficking of drugs, arms, and people on the other. For these reasons, governments often refer to them as criminal motor clubs or outlaw motorcycle gangs.

In Germany the Minister of Internal Affairs of a state (Bundesland) can prohibit organisations whose objectives and activities violate criminal law, the constitutional order or go against the peaceful coexistence of nations. Such a prohibition may, among other things, lead to the seizure of the organisation's assets; non-compliance with the prohibition can be sanctioned through criminal law.

In the Netherlands, the Public Prosecutor can request the court to prohibit organisations whose actions violate public order. Previous attempts to prohibit local Hells Angels chapters in this way have failed. According to the judiciary, the facts, which included intimidation, drugs and arms trafficking and inexplicable cash flows, were not evidence of the commission of organised, large-scale criminal offences of such a serious nature to justify a ban. In addition, the courts emphasized that the right of association is a great good within a democratic society, only to be curtailed in exceptional cases. In November 2016, the Public Prosecutor requested the Utrecht court to ban the Bandidos motor club.

While the Dutch courts emphasised the right of association in previous cases, the German Bundestag instead tightened the Association Act in January 2017 to prevent abuse of the right of association. The amendment provides for a ban on the use of club symbols related to already prohibited clubs.

As recent as 2012 and 2015 Germany saw a ban on the Aachen chapter of the Bandidos and the Cologne chapter of the Hells Angels, respectively, as well as on their various
supporting clubs, i.e. clubs that are subordinate to a prominent club. In addition, 2015 marked the first nationwide ban of an entire motorcycle club: Satudarah from the Netherlands. But does a ban aid the fight against criminal motorcycle clubs?

In Germany, members of prohibited motorcycle clubs have been known to simply switch clubs in some cases, or a support club takes over when the prominent club has been dissolved. In addition, members of prohibited motor clubs who have not switched clubs will no longer be identifiable to police and justice by their group symbols. This is particularly problematic with respect to members engaged in organised crime, of whom it is suspected that they go underground to continue their activities. In addition, there is fear of a relocation of criminal activities.

Proponents, however, point to the potential of a ban for closing down clubhouses, clamping down on individual members and banning group symbols. This would especially benefit the enforcement of public order and safety, since the presence of the prohibited club through its group symbols could no longer be used as a means of intimidation. It also sends a clear signal: criminal motorcycle clubs will not be tolerated.

In short, while a ban on criminal motor gangs may provide leads for resolving public-order issues, it will probably change little to the involvement of criminal club members in organised crime.

Photo © Flickr Jans Canon

17 https://www.flickr.com/photos/43158397@N02/5662347975/in/photolist-9Cn1Me-7RcDp3-7RnJ7J
‘Expect no mercy’

Published on 12 October 2017

Kim Geurtjens (Maastricht University) & Teun van Ruitenbug (Erasmus University Rotterdam)

In November 2016 the Public Prosecution Department (OM) announced to prepare civil proceedings against the Bandidos Motorcycle Club (MC). The government has to protect the citizens. The freedom of association stops once the encouragement and the use of criminal acts starts.

In November 2016 the Public Prosecutions Department (OM) announced the preparation of civil proceedings against the Bandidos Motorcycle Club (MC). Based on Book 10, Article 122 and Book 2, Article 20 of the Dutch Civil Code, an attempt is being made to ban both the international and the Dutch chapters of the Bandidos MC. This case was heard at the Utrecht court on Tuesday and Friday 6 October 2017. Both authors attended both session days and report on this civil case in this blog.

The cultivation of violence

The PPD is obliged to file a request for the ban on the Bandidos MC due to "activities contrary to public order". The Bandidos MC, together with several other MCs, are being labelled by the government as 'Outlaw Motorcycle Gangs'. As this blog deals with the viewpoints and wording of the Public Prosecution Department in particular, the term 'Outlaw Motorcycle Gang' or 'OMCG' will be used throughout. According to the PPD, it is important in this context that Bandidos members have been responsible for various violent criminal acts and forms of organised crime, both at home and abroad. The 'Expect No Mercy' patch appeared to be a central element in the argument put forward by the Public Prosecutor, particularly during the plenary session on 3 October 2006. According to the PPD, this patch can be earned by committing excessive violence against members of hostile OMCGs, sometimes leading to their death. As a "reward" for this violent action, some members receive the 'Expect No Mercy' patch, which they may then stick to their 'colours', i.e. leather vests.

'Soliciting, promoting and inciting others to commit’ violence in such a way makes them a thorn in the side of the PPD.’

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18 https://www.om.nl/onderwerpen/motorbendes
Raising one's status through violence on behalf of the club sends the wrong message, after all. It also shows that violence within the club is seen as normal. The existence of such a reward structure alone would have been sufficient grounds for the PPD to ban the club. To illustrate this, the Public Prosecutor describes an event involving German Bandido Rudi Heinz Elten\(^\text{19}\), a.k.a. 'Eschli', who was known within the OMCG world as very violent. On 8 October 2009 the provocation of a Hells Angel in Duisburg, Germany, cost him his life. Eschli was posthumously awarded the 'Expect No Mercy' patch for not running away but standing his ground instead.

The defendants, however, do not agree with this reading. The lawyer of the Bandidos explains that the 'Expect No Mercy' patch only shows that a member has 'suffered' for his club. This suffering can take place on a personal level, but also socially or financially, for example, when members serve a long prison sentence or spend a lot of money on long legal proceedings. 'Expect no mercy', in its literal sense, would thus not refer to Bandidos members themselves being unwilling to show mercy but rather to the notion that Bandidos members (should) expect no mercy from others, including rivalling OMCGs and the government.

The PPD finds this explanation 'implausible' and responds that the Bandidos are trying to claim the underdog position. Moreover, this interpretation would be inconsistent with another slogan of the club: ‘God forgives, Bandidos don’t’. At the same time, it became clear during the session that no Dutch Bandidos member has received this patch so far in The Netherlands. Apparently there is a high threshold for earning this one, says the PPD. Perhaps the Dutch Bandidos should have taken tougher action against some of the attacks on their properties\(^\text{20}\) in the village of Nieuwstadt in the province of Limburg in 2014 to earn the coveted patch. Or, the PPD continues, the members involved in the brawl in Sittard in May 2015 should not have run away when shots were fired at the out Dug Out café\(^\text{21}\). Be that as it may, the PPD is openly wondering how long it will be before the first Dutch member will be strutting an 'Expect No Mercy' patch. It does not intend to sit still and wait for this moment to happen, however. Various incidents in the Netherlands and abroad, together with their intimidating and violent appearance, justify a full ban of the Bandidos MC.

The PPD: 'Government has a duty to protect its citizens. Freedom of association stops, where the encouragement and commission of criminal offences start.'

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The signal function of a ban

Regardless of the true meaning of the 'Expect No Mercy' patch, it is clear that, overall, the Bandidos MC indeed shouldn't expect much mercy from the government. The civil case currently in court is only one link in the strategy against the Bandidos MC. Parallel to these civil proceedings, there is an ongoing large-scale criminal investigation into the individual members of the Bandidos MC. This criminal case brings a large number of Bandidos members before court for, inter alia, participation in a criminal organization (art. 140 sr.), money laundering, extortion, the transgression of the Weapons and Ammunition Act and drug-related crimes. If the current attempt to ban the Bandidos MC fails, the PPD may rely on a new law in the future: the administrative ban. The coalition agreement (page 4) published on 10 October 2017 at least expresses the firm conviction that a ban on Outlaw Motorcycle Gangs is imminent.

If the 'Expect No Mercy' patch is a symbol for the normalisation of violence, the civil ban requested by the PPD in turn sends a signal to the Bandidos MC and society as a whole: a club that exhibits unity to the outside world and cultivates violent behaviour cannot and must not be accepted in our society.

'Expect no mercy': the ruling by the Utrecht district court is expected on 20 December 2017.

An identical version of this blog also appeared on CrimEUR on 12 October 2017.

Photo © Wikimedia - Oliver Wolters

Photo © Pixabay

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24 https://nos.nl/artikel/2197308-dit-is-wat-je-moet-weten-over-het-regeerakkoord.html
Blog theme: Restrictions to EU citizens and third country nationals

Defending the Central European University: options for invoking EU law

Published on 7 April 2017

Alexander Hoogenboom

The Central European University is facing severe restrictions after a modification to the Hungarian Higher Education Act. This blog article argues that EU free movement law could be relied upon to challenge that amendment and that, considering the particularly egregious violation of Union law at issue, it is unlikely that the restrictions would be upheld.

The Hungarian government is taking steps to close down the Central European University. The modification to the Hungarian Higher Education Act27 in a basic sense stipulates that a foreign (non-EU) University must have an active campus in its State of origin. In addition, an agreement must be reached between the origin state and Hungary concerning provision of the education in question. Pending compliance, the institution is banned from enrolling new students in to any programs.

Whereas the amendment is phrased in general terms, in practice only the CEU is affected: It is incorporated in the US but only has an active campus in Hungary. The question in that respect arises whether there are options for the CEU to challenge these restrictions. Apart from the possibilities under domestic constitutional law or under the European Convention of Human Rights, it is submitted that also EU law can play a role.

In that respect, several elements should be considered.

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27 http://www.parlament.hu/rom40/14686/14686.pdf
**The wholly internal situation**

An initial difficulty concerns the ‘wholly internal situation’ – the rule that EU (free movement) law only applies in situations that include some kind of cross-border link.

This should not concern us overly. In Case 42/87, *Commission v Belgium*[^28], the Commission initiated an action before the Court of Justice against the Belgian authorities as a result of their higher education financing legislation. Following the Court’s ruling in case 293/83, *Gravier*[^29], in which the Court struck down the Belgian provisions charging differential tuition fees based (directly/indirectly) on the nationality of the students, Belgium duly amended the relevant legislation. However, in its higher education financing provisions it limited the amount of funding available for higher education institutes for, in essence, foreign students.

Despite this measure being limited to the territory of Belgium, the measure did of course indirectly affect foreign students coming from abroad: the Court thus found this to violate what is now Article 18 TFEU, which prohibits discrimination on grounds of nationality.

Two important points should be taken from this:

1. Where Member State legislation operates to the detriment of foreign students, this is a matter that can be tested for compliance with EU free movement law.
2. Universities, as providers of education, can invoke EU free movement and non-discrimination provisions – this also follows from the C-153/02, *Neri*[^30].

**The situation of the CEU**

The CEU can be considered to have a dual ‘American-Hungarian nationality’ for the purpose of EU free movement law. However, ‘third-country nationals’ do not fall within the scope of EU free movement law. And the ‘Hungarian’ part of the CEU is situated in Hungary.

Nevertheless, the CEU has a variety of cooperation agreements[^31] with other Universities and, perhaps more importantly, attracts students and staff from all over the European Union[^32].

Preventing the CEU from enrolling new students will certainly affect both the mobility of this international student body (no new enrolments), staff (no students, no work) and the operation of cooperation (e.g. education exchange) agreements. Moreover, legislation that puts into doubt qualifications earned by students without this being justified by reference to


[^31]: https://www.ceu.edu/partnerships/cooperation

[^32]: https://www.ceu.edu/about/facts-figures/students
e.g. doubts as to the quality of the provided education was also found to restrict the freedom of establishment of higher education institutes (Neri, para. 42-43).

The legislation in question can thus be challenged on the grounds of Article 21 TFEU (‘liable to restrict the exercise of free movement rights’) as well as Article 49 TFEU (liable to restrict the exercise of the freedom of establishment of the CEU, a privately funded university). In addition, since EU free movement law is applicable, the Charter of Fundamental Rights is also potentially applicable following the case of Åkerberg Fransson. Article 14 includes the ‘freedom to found educational establishments with due respect for democratic principles’ as well as the ‘right to education and to have access to vocational and continuing training’. Both elements may very well be at issue here.

**Is there scope for justification?**

It would seem unlikely that under EU law the restriction could be justified. First, insofar the Hungarian government would invoke the need to protect the quality of (higher) education, it is questionable whether the legislative amendment is truly based on ‘objective, non-discriminatory criteria’ (Gottwald, para. 30): after all, a single institution is in effect targeted and several indications point to a personal vendetta of prime minister Viktor Orbán against the founder, George Soros.

Secondly, it is doubtful whether this goal can seriously be considered to pursued in a ‘systematic and consistent manner’ (Hartlauer, para. 55). After all, the degrees provided by the CEU are accredited by the Hungarian Accreditation Body (in addition to the US accreditation), which normally guarantees the quality of education provided.

Thirdly, it may be wondered whether there are no less restrictive measures that could be considered beyond simply prohibiting enrolment pending the outcome of negotiations (US-Hungary) in which the Central European University has no part to play.

Finally, it may very well be doubted whether proportionality in the strict sense is complied with: indeed there seems to be no legitimate objective which justifies the detriment to the interests of the institution, staff and students.

The balancing act thus falls in favour of the continued possibility of the CEU to continue its mission of ‘the pursuit of truth wherever it leads, respect for the diversity of cultures and peoples, and commitment to resolve differences through debate not denial.’

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33 http://curia.europa.eu/juris/documents.jsf?num=C-617/10
34 http://curia.europa.eu/juris/error.jsf?cid=898911
37 https://www.ceu.edu/administration/accreditation
38 https://www.ceu.edu/about
Quota system for 'risk countries': is Saxion crossing the line?

Published on 3 March 2017

To counter misuse of student visas the Saxion University of Applied Sciences applies a so called ‘quota system’ for students from ‘risk countries’. The question is whether a quota is an appropriate instrument and if it is not in conflict with (European) law.

Saxon UAS has a quota scheme in place for students from Bangladesh, Nepal, Pakistan and Sri Lanka. In addition to the usual requirements with respect to English language skills, the admission requirements as listed on the site\(^{39}\) outline the following:

‘Specific requirements for students from Bangladesh, Nepal, Pakistan and Sri Lanka
For students from these countries the following additional entry requirements apply.
(…)
Maximum number of students

**A maximum of 10 students per country is admissible to our university (excluding NFP and Exchange students), selected on a 'first paid, first come' basis.’**

Effectively, this is a quota on the basis of nationality. Moreover, a member of Saxion UAS stated in an article in Elsevier magazine that the cut-off would not be hard.\(^{40}\) This is problematic in a formal sense and in a material sense.

In the formal sense it is unclear to prospective students which requirements they must meet in order to (be able to) register. The English-language website seems to be quite clear: the unequivocal terms and the phrase ‘first paid, first come’ give the impression of a hard requirement. Saxion UAS staff members, on the other hand, present a different picture in the media.\(^{41}\) It is doubtful whether this conscious or unconscious ambiguity is in accordance with the duty to provide uniform information, about ‘the selection of students’, among other things, as laid down in Article 7.15 of the Higher Education and Research Act (WHW).

The quotas are also problematic in material terms. The background of the quota system is to combat the 'abuse of students visas'.

\(^{39}\)https://www.saxion.edu/site/programmes/degree/entry-requirements/

\(^{40}\)https://www.elsevierweekblad.nl/nederland/achtergrond/2017/01/hogeschool-saxion-gaat-studenten-uit-risicolanden-weren-439575/

\(^{41}\)http://www.tvenschedefm.nl/saxion-roept-halt-toe-aan-nepstudenten/nieuws/item?945113
The question is on what legal basis this quota scheme rests, whether it is hard or 'soft', i.e. discouragement or signal. According to Article 7.37, paragraph 1 WHW, registration is open to people who meet the educational, financial and administrative requirements. Selection at the gate is allowed only in special circumstances, certainly not on the basis of nationality (see Article 6.7 WHW). A numerus fixus may be applied in certain cases, but only to prevent the overburdening of the available educational capacity or a surplus of graduates on the labour market - cf. Articles 7.53 and 7.56 WHW.

The only option thus left is to contest the legal residence statuses of the people involved. Even so, it would still be questionable whether Saxion UAS could hold this against a student under the WHW, given that its task is typically limited to determining whether the stay is legitimate as evidenced by the document issued by the Dutch immigration service IND. On the other hand, Universities do have certain obligations within the framework of the Aliens Act as recognized referents. As a referent, Saxion UAS is the party issuing the requests for the residence permits of third-country students, although students can also do it themselves. *(Article 1.13 jo 3.41, paragraph 2 of the Aliens Decree 2000).* Abuse of rights is indeed a ground for denying or terminating legitimate stay: Article 8.25 Aliens Decree 2000.

This remains problematic nevertheless as European Law is applicable besides Dutch Law. The current legal framework is motivated by Directive 2004/114. In case C 91/13 of Ben Alaya, the German authorities expressed doubts about the student’s motivation and about the lack of connection between the degree programme chosen and the student’s intended future profession. The Court, however, found that a third-country national who meets the conditions contained therein, has the right of entry and residence for study purposes. While this right can be repealed in case of abuse, this would require the investigation of strictly individual cases. The Directive therefore does not allow for a general quota in any case.

The new Directive 2016/801 stresses this ban on quota even further (Article 6). In addition, Recital 41 (to be read in conjunction with Article 20 (2) (f) states that:

> 'In case of doubts concerning the grounds of the application for admission, Member States should be able to carry out appropriate checks or require evidence in order to assess, on a case by case basis, the applicant’s intended research, studies, training, voluntary service, pupil exchange scheme or educational project or au pairing and fight against abuse and misuse of the procedure set out in this Directive.'

Two conclusions can be drawn from the above: Applied to Saxion UAS, it is clear that use of a quota, whether hard, i.e. Setting a maximum of 10 students, or soft, i.e. the active exclusion of a group of students with a certain nationality, is contrary to European law both under the current system and the system to be implemented. This does not imply that the abuse of student visas is not a serious problem and no measures could be taken. A quota,
however, is too blunt an instrument and may lead to the exclusion of ‘genuine’ students. It remains important to give each prospective student a fair chance.

The second issue is of a more general nature: In the present system universities have a dual role: one as an institution of higher education and one as a link/referent in the context of the Aliens Act. The obligations and responsibilities associated with these roles are not always compatible, causing educational institutions to get caught between a rock and a hard place in some cases. This issue deserves more attention from policy makers in order to arrive at effective and legally compliant solutions.

Photo © Wikipedia ‘Saxon Deventer’42
Crossing borders in search of education? Not for schoolchildren!

Published on 30 October 2017

Alexander Hoogenboom

Can Member States of the EU prohibit pupils from attending education abroad, simply on the belief that it might hamper the integration of these children into society? This contribution shows that educational mobility for schoolchildren is still fraught with obstacles in an area supposedly without internal frontiers, but that the restrictive measures of such mobility likely do not comply with EU law.

Primary and secondary education have an important role to play to ensure that new members of society are taught certain basic knowledge and skills, but also to induct them into the values, norms and principles that society holds dear. Such education is thus simultaneously the foundation of personal development and emancipation, as well as a process of socialisation and integration.

In recent times, however, some states are seeking to exert more control over the ideological development of the young. In the US, Trump stresses that his policy of ‘America First’ requires having schools teach ‘patriotism’\(^43\). Similarly, the Dutch coalition agreement\(^44\), specifies that schoolchildren must now learn the national anthem and its context – an idea of the Dutch Christian Democrat leader Buma meant to counter the perceived threat of multiculturalism\(^45\). And in Germany, a multicitzenship (German, Dutch and New Zealand) family was recently forced to sell their house and business, and to leave the country\(^46\) so that the children would be allowed to attend an international school in the Netherlands.

If this sounds extreme, read on.

A sad story

After the closure of the St. George’s international\(^47\) school in Aachen, several of the parents sought to have their children attend education at the United World College in Maastricht. This was, however, prohibited by the NRW Schulamt, which is tasked with the supervision

\(^{43}\) http://time.com/4641112/trump-patriotism-day-history
\(^{44}\) https://www.tweedekamer.nl/sites/default/files/atoms/files/regeerakkoord20172021.pdf
\(^{45}\) https://nos.nl/artikel/2161177-buma-kinderen-moeten-weer-staand-wilhelmus-zingen.html
\(^{47}\) http://www.aachener-zeitung.de/lokales/aachen/75-kinder-muessen-sich-neue-schule-suchen-1.1263648
of the schulpflicht in Nordrhein-Westfalen (Article 88 jo. 37 Schulgesetz NRW). The reasoning was that this would hamper the integration of the child(ren) into German society. The consequence of this policy is that this particular family, with deep roots in Germany, had no choice but to move countries in order for their children to attend their education of choice.

The point of this contribution is to assess whether this policy is legal in the EU context. The Premable to the Treaty on the European Union after all reminds us ‘the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe’. The behaviour of the NRW Schulamt in this case goes against this very basic principle and, as will be argued, violates EU law.

**Can Member States prohibit their citizens from attending education abroad?**

Two points must be made clear at the outset.

First, the United World College is a Dutch state-subsidised (‘bekostigd’) school, subject to the *Wet op het primair onderwijs*, and supervised by the *Onderwijsinspectie*. The most recent report indicates that the United World College is an ‘example for other schools’ due to the fact that it scored very well on a relatively large amount of the quality indicators.

Secondly, where it concerns a Union citizen residing in Germany but attending education in the Netherlands, EU law is *a prima facie* applicable. Since the United World College is state-sponsored, it can be debated – based on the Wirth case - whether it provides ‘services’ within the meaning of Article 49 TFEU and thus whether the measure could be challenged under that heading. However, in any case the child may rely on Article 21 TFEU with a view to exercise her free movement rights for the purpose of attending education elsewhere. This was confirmed in the case of Schwarzz, in which the Court of Justice of the European Union held:

‘The Schwarz children, by attending an educational establishment situated in another Member State, used their right of free movement. As is shown by the judgment in Case C-200/02 Zhu and Chen [2004] ECR I-9925, paragraph 20, even a young child may make use of the rights of free movement and residence guaranteed by Community law.’

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In that same case, the Court moreover held that:

'National legislation which places at a disadvantage certain of the nationals of the Member State concerned simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union (...).'

The situation examined here goes one step further: The Schulamt is prohibiting the child in question from attending education in another Member State tout court. This constitutes a breach of what is now Article 21 TFEU (former Article 18 EC) following the case Jipa51.

But what of possible justification grounds?

Such restrictions may only be justified if it is ‘based on objective considerations of public interest52 independent of the nationality of the persons concerned and if it is proportionate to a legitimate objective pursued by the provisions of national law. It follows from the case-law of the Court that a measure is proportionate if, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective.’

As seen above, the United World College has near-exemplary scores as to the quality of the education provided. It follows that any argument with respect to the lack of quality of education abroad must fail out at the outset.

The Schulamt has primarily invoked that the pursuit of education in Germany is crucial to ensure the integration of resident children in German society. Case law of the Court of Justice also indicates that Member States can in certain circumstances invoke the need to protect the national identity in this respect, as education is an integral part thereof53.

It may however be wondered whether this is a legitimate argument in this context. After all, the Court has indicated that access to education abroad is a core element to the free movement of students within the European Union54, which the EU actively seeks to promote55. In that light it may be wondered whether it is legitimate for a Member State to prohibit its nationals from pursuing education abroad at all.

Alternatively, even if the aim would be accepted as legitimate, there are several reasons to consider that it still fails the test of proportionality.

First, it may be wondered whether the policy employed seeks to attain this aim in a systematic and consistent manner\textsuperscript{56}. The relevant Schulgesetz NRW provides in Article 34(5) that the Schulpflicht may also be fulfilled in recognised/approved international schools situated within Germany. Children may attend this school without special leave to do so by the Schulamt. This is somewhat strange. Seeing as the curricula of international schools are, indeed, international, it seems the Schulamt is simply concerned with the place of establishment. Somehow following an international curriculum in Germany safeguards integration into German society whereas this is not the case if that same or similar curriculum is pursued in the Netherlands. As such the integration criterion not pursued systematically and consistently: this constitutes a breach of the principle of proportionality.

Secondly, the Court of Justice has made clear that when a Member State is to assess the degree of integration of a person, it cannot base this assessment simply on a single criterion such as, in casu, school attendance in Germany. In Martens\textsuperscript{57}, the Court held:

\textit{The legislation at issue in the main proceedings, inasmuch as it constitutes a restriction on the freedom of movement and residence of a citizen of the Union, such as the appellant in the main proceedings, is also too exclusive because it does not make it possible to take account of other factors which may connect such a student to the Member State (...), such as the nationality of the student, his schooling, family, employment, language skills or the existence of other social and economic factors (see, to that effect, judgment in Prinz and Seeberger, EU:C:2013:524, paragraph 38). Likewise, as the Advocate General stated at point 103 of her Opinion, the employment of the family members on whom the student depends in the Member State providing the benefit may also be one of the factors to be taken into account in assessing those links.’}

It follows that the personal circumstances of the child must be taken into account, such as her nationality, her language abilities, the situation of her parents and other social and economic factors. The Schulamt may not simply reject an application on the stated grounds without a thorough examination of these factors. When looking at the family which had to move from Germany to the Netherlands: both the mother and the father worked in Germany, the children spoke German, and the family lived in Germany. It can hardly be doubted that the children are sufficiently integrated into German society.

\textsuperscript{56} http://curia.europa.eu/juris/document/document.jsf?text=&docid=77514&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=449247#point55

\textsuperscript{57} http://curia.europa.eu/juris/document/document.jsf?text=&docid=162536&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=447248#point41
Conclusion

There are several reasons to consider that the Schulamt’s decision and overall policy to prohibit education attendance in another Member State of the EU breaches EU law. Neither the lack of quality of education abroad nor the supposed ‘danger to the integration of the child’ can justifiably invoked to justify a restriction of free movement for education purposes. Considering the Schulamt’s strictness in this, it is likely that a procedure before a national court is necessary to change the policy in this regard. Until such time, the Schulamt should take note of the lengths parents will go, and justifiably so, for their children to receive the education they think is in their best interest. In that light, one could seriously wonder whether in the case of the family who left house, job and country integration into German society was achieved...

Photo © Pixabay 'Student school back to school'\textsuperscript{58}

\textsuperscript{58} https://pixabay.com/en/student-school-back-to-school-1647136/
Blog theme: Potential effects on border regions

The German Autobahn toll scheme: its effects on the border regions

Published on 23 June 2017

Barbara Hamacher, Martin Unfried

Amidst the public debate on the potentially discriminating impact of the German toll scheme for passenger cars and the expected revenues, border regions are raising their voice about the potentially negative impacts on cross-border interaction. A closer look reveals that the impacts could be economical, ecological and social in nature. As part of its annual cross-border impact assessment, the ITEM Expertise Centre does research on the expected effects in the Meuse-Rhine Euregion.

With the implementation of the toll scheme now adopted by the German Government and Parliament, what are the potential effects for the German-Dutch border regions? And what does the toll instrument mean for European integration and the harmonization of future toll systems in the EU?

Many EU Member States have toll systems for passenger cars in place. One prominent system is the Vignette system, e.g. in Austria or Slovenia, where car drivers buy a vignette for a certain period of time, which has no relation whatsoever to the number of kilometres driven. The other prominent system is distance-related toll on sections of motorway, like in France or Italy. The German federal Government decided to implement an infrastructure charging system, i.e. toll⁵⁹, for passenger cars in line with the first model. As a consequence, foreign car drivers will have to buy a Vignette in order to drive on the German Autobahn. Although both foreign and domestic car owners will have to pay the toll charge, the latter will obtain tax relief through a deduction from the national vehicle tax of at least the same amount as the toll charge.

Current debate

The introduction of toll has been causing major controversy in Germany for years. Initially, only one smaller regional party of the present coalition, the CSU from Bavaria, advocated the instrument. Meanwhile, two issues are still being pushed by the many sceptics: whether the toll scheme will actually generate substantial revenues at all, given the intended tax

⁵⁹ http://www.bmvi.de/SharedDocs/EN/Articles/LA/infrastructure-charging-bill.html
compensations to German citizens; and whether the German toll scheme will not be seen as a breach of EU law due to its discriminatory effect on foreign car owners.

Surprisingly, however, the European Commission suspended the infringement procedure after recently agreeing with the German government on two main changes in the governing piece of legislation, the Infrastrukturabgabengesetz: firstly, a further differentiation of the vignette system from three to five vignettes, emphasizing the environmental impact of the toll; and secondly, lower prices for short-term vignettes, which are typically bought by foreign car owners.

Meanwhile, the accusation that the toll scheme would have a discriminatory effect on foreign car drivers persists in other forums: the European Parliament as well as several law professors in Germany and other European countries maintain their criticism and refuse to recognize in these changes a termination of the scheme’s discriminating effect.

In addition, there is still the broad expert discussion inside Germany about the estimated revenues and whether there will be any net revenues for German infrastructure at all.

**Potential impacts on border regions**

A closer look at Germany’s planned road toll scheme for private cars reveals that many negative impacts threaten the border regions:

Economically, German entrepreneurs close to the borders fear financial losses due to a declining number of customers from the neighbouring countries.

Ecologically, the toll system is likely to affect the environment negatively by deflecting traffic from the motorways to secondary roads.

Socially, there is a real risk of relaunching the barrier effect on the internal European borders, of restricting cross-border interaction and of creating a sense of discrimination on the other side of the border. It could also spark the introduction of similar toll systems in the Netherlands or Belgium. The introduction of the German system certainly makes a European harmonization of toll systems, as recently advocated by the European Commission, more difficult. For citizens and companies in the Meuse-Rhine Euregio, this could mean having to deal with many different toll systems in the future.

**ITEM’s Cross-border Impact Assessment 2017**

ITEM recently worked on a study of the potential impacts of a German toll system on its border regions, in the context of ITEM’s 2017 Cross-border Impact Assessment.

Photo © Wikimedia 'Zeichen 391 - Mautpflichtige Strecke, StVO 2003'
Blog theme: Cross-border Pensions

Life certificates: a barrier to the free movement of pensioners

Published on 6 February 2017

Sander Kramer

Have you ever considered of enjoying your retirement elsewhere, perhaps in a sunnier European destination? Based on the European Citizenship and the freedom of movement you are free to reside elsewhere in Europe. But are you truly free or are you obstructed in your freedoms?

One of these obstacles of the European freedoms is the life certificate.

Pensioners continue to receive their Dutch pensions after emigration. This includes their AOW pensions and any supplementary pensions. One of the conditions is the annual submission of a Life Certificate. This obligation exists because no data exchange takes place between the Sociale Verzekeringsbank SVB (Social Insurance Bank) or Dutch pension funds on the one hand and the foreign municipalities, administrations, social insurance banks or pension funds on the other. This implies that the SVB or pension fund are not automatically informed by the foreign authorities of the life and death of the beneficiary living outside the Netherlands. This type of information exchange does take place for pensioners living in The Netherlands. Note that this obligation also applies to German or Belgian pensioners enjoying their pensions outside Germany or Belgium, respectively.

Life certificates are sent to foreign pensioners by the SVB or the relevant pension fund, typically digitally. The foreign pensioners are then obliged to fill out the document and have it signed by the foreign competent authority, e.g. the Dutch embassy or the foreign municipality, which typically incurs a legal fee or cost reimbursement. If the certificate is not completed and returned, the pension benefit will be suspended, thus ending the guaranteed Europe-wide export of pension benefits. Despite certain harmonisation measures, such as the ‘Agreement on the issuing of Life Certificates’, which was joined by the Netherlands on 3 August 2011, there are still differences in submission methods and times.

65 https://commons.wikimedia.org/wiki/File:Zeichen_391_-_Mautpflichtige_Strecke,_StVO_2003.svg
The established case-law of the European Court of Justice, including, for example, the Kohl\textsuperscript{66}, Martens\textsuperscript{67}, Turpeinen\textsuperscript{68} or Pusa\textsuperscript{69} cases, shows that national systems that harm certain individuals with the nationality of that country for the sole reason that they have exercised their right to move and reside freely in another Member State constitute a restriction of the freedoms that every citizen of the Union enjoys. The life certificates prevent the free movement rights from taking full effect, as the pensioners are hindered in the exercise of these rights by legislation in their state of origin, i.e. The Netherlands, that harms them for having exercised their rights to free movement. In the light of European citizenship and the European freedom of people, and bearing in mind all the elements involved, this obligation to submit a life certificate must be considered an obstacle to the European rights of free movement.

Although the European integration and unification process can be seen as one of the major achievements of the Treaty of Maastricht, it is hindered by national administrative obligations. The initiative to lift these bureaucratic and administrative obstacles to cross-border mobility and the exercise of the European freedoms lies with the Member States. Cross-border checks of ‘being alive’ can be performed in collaboration with external partners, such as social insurance banks, pension funds and (local) authorities, thus setting a good example for others to follow.

**Photo © Dreams Time ‘Couple viewing ocean’\textsuperscript{70}**

\textsuperscript{66} http://curia.europa.eu/juris/liste.jsf?language=nl\&jur=C,T,F\&num=C-300/15\&td=ALL  
\textsuperscript{67} http://curia.europa.eu/juris/liste.jsf?language=nl\&jur=C,T,F\&num=C-359/13\&td=ALL  
\textsuperscript{68} http://curia.europa.eu/juris/liste.jsf?language=nl\&jur=C,T,F\&num=C-520/04\&td=ALL  
\textsuperscript{69} http://curia.europa.eu/juris/liste.jsf?language=nl\&jur=C,T,F\&num=C-224/02\&td=ALL  
\textsuperscript{70} https://nl.dreamstime.com/couple-viewing-ocean-gratis-stock-fotografie-imagefree1074947
Electronic data exchange: solution for cross-border mobility?

Towards electronic data exchange within the EU: removing administrative obstacle

The increasingly developed electronic data exchange within the European Union could remove the administrative hurdles to the exercise of the European freedoms of movement and cross-border mobility, such as the life certificates, described in an earlier blog\(^{71}\), and the so-called certificate of coverage\(^{72}\). This development is particularly welcome from a cross-border perspective.

According to the European regulation on the coordination of social security systems, the Member States are obliged to make increasing use of new technologies for the exchange of social security information. Both regulations are based on the principle of good administration through improved cooperation between the social security bodies of the Member States of the European Union. This improved cooperation includes the information that is provided to citizens, troubleshooting, combating fraud, avoiding errors and a fast cross-border payment of benefits. For the purposes of the application of those regulations, the exchange of information is based on the principles of, among other things, efficiency, fast delivery and accessibility, including e-accessibility, in particular for the elderly. This information exchange between the bodies or the liaison bodies will take place electronically, in particular when determining the rights and obligations of foreign beneficiaries.

Currently, no EU-wide data exchange system is in place yet, and the exchange of social security information between the bodies in the EU has taken place on paper until now. One of the developments ensuing from the aforesaid objectives and principles of the European regulations is the Electronic Exchange of Social Security Information (EESSI). Under the EESSI-system, all communication between the national bodies on cross-border social security takes place via 'structured electronic documents', to make the exchange easier and more efficient. From 1 May 2010 until the time of entry into force of EESSI, expected in mid 2019, a transition period will apply, in which paper versions of these electronic forms may still be exchanged. The above-mentioned documents will be

\(^{71}\) https://www.maastrichtuniversity.nl/nl/blog/2017/02/levenscertificaten-een-belemmering-van-het-vrije-verkeer-van-pensionado%E2%80%99s

\(^{72}\) https://www.svb.nl/int/en/id/werknemers/e101_formulier/index.jsp
forwarded by EESSI to the social security body in the other EU member state, while a database will allow these bodies to look up the relevant bodies in the other EU member states. For the time being, the exchange of paper documents, such as an A1-declaration, is catalysed by case-law\(^3\) of the European Court of Justice.

From a cross-border perspective, a closer and more efficient cooperation between social security bodies in the EU is of vital importance, as it allows foreign benefit recipients, among others, to exercise their rights as soon as possible and under the most favourable conditions. In order to achieve this, the use of electronic communications is the appropriate way, ensuring rapid and reliable data exchange between the bodies of the Member States. Ideally, the electronic data from the authorities of the Member States could be updated in real time, which would facilitate the exchange between the bodies of the Member States.

For foreign benefit recipients, the EESSI-system will lead to a swifter administration of benefit applications and a faster calculation and payment of benefits as the relevant information will be exchanged automatically and electronically between social security bodies across the various EU Member States. For social security bodies, on the other hand, the EESSI will lead to standardized information flows, better multilingual communications and optimized data verification and collection. In this way, it will ease the administrative burden for both foreign benefit recipients and social security bodies. As the paper forms become superfluous, they will remove an administrative obstacle to the exercise of the European freedoms of movement.

**About the author:**
Sander Kramer has been a PhD researcher at the Institute for trans-national and cross-border cooperation and Euregional Mobility / ITEM since June 2016. For more information about his research on cross-border pension communication, please visit:

**News article:** Start of research on the cross-border pension tracking service regarding the Netherlands, Belgium and Germany (05-06-2016)

**PhD research:** Towards a cross-border pension tracking service between the Netherlands and Germany

**Photo © Pixabay 'Binary code'\(^4\)**

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The importance of a flexible AOW commencement date

Flexible retirement age as a solution for unemployed cross-border workers

Published on 5 October 2017

Bastiaan Didden

At the end of September, the Dutch and Belgian ombudsmen called on their governments to take action in the context of pensions problems for unemployed cross-border workers, aged 65, and living in Belgium. In response to this call, a possible solution by Expertise Centre ITEM is elaborated in this blog.

The flexibility of the AOW age has sparked a lot of interest lately, while the discussion increasingly focussed on people with unhealthy professions. However, a group of people who would also benefit from a flexible AOW pension age are frontier workers, as indicated several times by ITEM in, for example, this opinion piece on the Pension Pro website.75

This showed once again on 29 September 2017 from a call76 by the Belgian and Dutch ombudsmen to the Belgian and Dutch governments to find a solution for 65 year-old frontier workers in Belgium who worked in the Netherlands and have become unemployed. Unemployed Belgian workers who did not work in the Netherlands as frontier workers start receiving their Belgian pension from that age. Unemployed frontier workers residing in Belgium who worked in the Netherlands, however, start receiving their accrued Dutch statutory pensions at the current Dutch statutory retirement age of 65 years and 9 months. This will rise to 66 in 2018 and to 67 years and 3 months in 2022.

The aforementioned unemployed frontier worker thus falls between two stools due to the different statutory retirement ages in Belgium and The Netherlands. This is an undesirable situation, and it is estimated77 that this applies to 2,000 former frontier workers in 2017. Reason for the two ombudsmen to urge both governments to take action.

As far as ITEM is concerned, this action could consist of a further investigation of the possibility of a flexible AOW age, which can help align the Belgian and Dutch statutory retirement ages. A flexible AOW pension age might be an appropriate solution for the unemployed 65-year-old Belgian frontier worker, certainly with a view to the future and as

75 https://pensioenpro.nl/login/?target=/nieuws/881681-1701/flexibilisering-aow-pakt-goed-uit-voor-grenswerker
a result of the manner in which both countries regulate the increase of the statutory retirement age.

Photo from Flickr by ArcheoNet Vlaanderen

**Author: Bastiaan Didden**

Bastiaan Didden is a PhD student associated with Expertise centre Institute for Transnational and Euregional cross-border cooperation and Mobility / ITEM, conducting research under Prof. Anouk Bollen-Vandenboorn and Prof. Marjon Weerepas and the Department of Tax Law.

Read more about his research at Expertise Centre ITEM:

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Blog theme: Cross-border taxation and social security law

Combat social dumping more successfully with a renewal of the posting of workers directive?

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Social dumping is a difficult issue at present in political institutions, both national and European. In short, social dumping, workforce in most cases are working under appalling conditions by being seconded in other countries.

To combat social dumping, EU Commissioner Thyssen launched a proposal\(^79\) in the spring of 2016 to change the current Posting of Workers Directive 96/71/EC. After invocation of the so-called yellow card procedure, particularly by Eastern European Member States, Thyssen decided to retain the original text. It is important that, among other things, the free movement of services and the free movement of workers are promoted, but just naming these two freedoms immediately exposes the contradiction between them. After all, the optimal implementation of the free movement of services will not always benefit the free movement of workers or vice versa.

One of the spearheads of the proposal is that the same labour-law regulations should apply regarding payment for the same work in the same place, regardless of whether a local or a posted worker does the work. A positive point is that the proposal considerably expands the minimum conditions outlined in the current Posting of Workers Directive, even though that raises new questions of its own. The proposal advocates equal remuneration, for instance, but what exactly can be considered 'remuneration'? Would this include continued wage payments in case of illness, for example? An important point in the proposal is that the applicable labour law becomes that of the work state after 24 months of work in this work state. Even though this does not become clear from the draft Directive, it seems that this period of 24 months is based on the maximum posting period as outlined in Regulation No 883/2004 on the Coordination of Social Security Systems. Since the introduction of the proposal, there have been calls, however, for reducing the 24-month period to six months (see e.g. a recent note by Dutch labour union CNV\(^80\)). This term seems to refer to the period of 183 days laid down in the fiscal posting of workers regulation. It is to be welcomed that not only labour law, but also social security and tax law are taken into


consideration. And, admittedly, the aim for coordination between premium and tax liability is a noble one, but the question is whether a reduction of the term to six months is of help to posted workers. According to Art. 57 of Regulation 883/2004, for example, a Member State is not required to provide old-age benefits if the insured periods do not exceed one year. The Regulation does require, however, that Member States add up short periods that together comprise more than a year for the granting of these benefits and, for example, unemployment benefits. See further CVA Explanatory Note\(^\text{81}\). In addition to these issues, it is also cumbersome for the workers concerned to switch to a different system of social security after six months and then to have to leave that system again in the foreseeable future.

The question, however, is whether this is the right time to adapt the Posting of Workers Directive. I refer here to the Enforcement Directive\(^\text{82}\) that should have been implemented in June 2016. The Netherlands did, even though reporting duties have been suspended until the digital notification system is operational, probably in 2018\(^\text{83}\). A number of Member States have not yet completed the implementation, however. The Enforcement Directive provides more opportunities for checks than the current Posting of Workers Directive. Given that combating social dumping is largely about performing checks, it raises the question whether we should not first await the effects of the implementation of this Directive and its inherent checking tools. It does not make much sense, after all, to embellish new rules that are not being properly enforced in the first place. In addition, the average posting lasted for 103 days in 2014. This would mean that the inclusion of the 24-month term will not have the desired effect in many cases, which is not to say that the 183-day proposal is the ultimate solution. One possible checking mechanism might be the introduction of a licensing system for employment agencies, like in Belgium.

It is clear that the issue of social dumping should be addressed. The relevant authorities in the field of labour, social security and tax law must jointly combat the phenomenon of social dumping. One of the questions that has to be answered in this context is whether the terms should be the same in all areas of law, all while considering the interests of the workers concerned!

\textit{Marjon Weerepas is Associate Professor in Tax Law and Member of the Maastricht Centre for Taxation.}
\textit{She is also linked to ITEM.}

\textbf{Photo © Pixabay ‘Hands suit’\(^\text{84}\)}

\(^{81}\) https://www.svb.nl/Images/Europese%20toepassingsverordening.pdf
\(^{83}\) http://wetten.overheid.nl/BWBR0038054/2016-07-01
Abolishing the 30%-facility? Look before you leap!

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The 30%-facility is regularly discussed in both case-law and politics. The facility is currently under pressure and facing turbulent times. With a potential abolition, which may become reality, particular attention must be paid to the effects and possible alternatives.

The 30% scheme currently faces turbulent times and is under pressure. The 30% tax ruling is a facility within payroll tax that allows for 30% of the salary to be enjoyed free from tax. Both incoming and outgoing employees can use the scheme for up to eight years, under certain conditions. The conditions for incoming employees include, among other things, having specific expertise and having resided in The Netherlands at more than 150 km from the Dutch border for more than two-thirds of the period of 24 months prior to previous employment. In addition to businesses, Dutch universities make regular use of the 30% scheme to attract sufficient numbers of specialised staff.

The scheme is regularly invoked in case law. There was an important ruling, for instance, on the 150 km limit: the Sopora ruling. (Ecj 24 February 2015, Case C-512/13, ECLI:EU:C:2015:108, BNB 2015/133, m.nt. G.T.K. Meussen, NJ 2015/316, with notes by J.W. Zwemmer) Knowledge workers who live and work in the Netherlands within the 150 km zone from the border are not allowed to use the 30% scheme. A further distinction is made between foreign taxpayers who live within the 150 km zone and those who live outside. The Court of Justice considers that the requirement is not contrary to Article 45 TFEU, unless the limit is set in such a way that the exemption systematically leads to clear overcompensation of the extraterritorial costs actually incurred. The Supreme Court caused turbulence with its judgement after the Sopora ruling, holding that the scheme does not cause systematic overcompensation. This does not apply to individual overcompensation but systematic overcompensation. (Ecj 24 February 2015, Case C-512/13, ECLI:EU:C:2015:108, BNB 2015/133, with notes by G.T.K. Meussen, NJ 2015/316, with notes by J.W. Zwemmer)

Not only for magistrates, but also in the political arena, the 30% scheme is the object of discussion. At this moment there are calls for abolishing the 30% scheme, including, for example, in the election programmes of political parties SP, PvdA, Groenlinks, DENK, SGP and VNL. D66 proposes a task-setting limit by € 0.5 billion to the 30% scheme of limit the tasks, while CU and SGP advocate limiting the use of the 30% scheme to salaries lower than or equal to the Prime Minister's salary, the so-called Balkenendendnorm (after former Dutch Prime Minister Jan-Peter Balkenende who introduced the concept). In addition, the
CU wants to limit the use of the scheme to five years. (Sjaak Janssen, De fiscale ideeën in de verkiezingsprogramma’s, WFR 2017/49) Of course, this depends on the outcomes of the formation process and the subjects outlined in the coalition agreement. We can only hope that all the pros and cons and all the consequences have been weighed and taken into account before the decision to abolish is made. Another option is to explore possible alternatives, such as altering the percentage, having employers reimburse the actual extra-territorial expenses, and adjusting the period of eight years.

One might also look abroad in the search for alternatives. It is remarkable that many European countries have facilities for specialized staff that are similar to the 30% scheme. Some are directly comparable to the Dutch facility, such as those in Italy and Sweden, while others may consist of a tax exemption for certain sources of income, like in Belgium, or offer a reduction in the applicable tax rate, e.g. in Denmark, among others. Many such schemes include the specific expertise requirement (Belgium, Denmark, Finland, Sweden and Portugal), and they are generally limited in time. Sweden, for example, has set a period of three years. (Kamerstukken II, vergaderjaar 2011/12, 33 003, no. 10, p. 69-70) Germany is the great exception; it does not have such a scheme.

The consequences for the staffing policy of universities are unknown should the Netherlands indeed abolish the 30% scheme. It is to be hoped that the legislator explicitly pays attention to the consequences of abolition for universities and other educational institutions in the discussion of the amendment of the 30% scheme.

Photo © Pixabay ‘30 percent’\(^8^5\)

\(^{85}\) https://pixabay.com/en/discount-percent-save-advantage-1015446/
List of contributors

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- Myth: Brussels imposes nothing but annoying measures
  *From De Observant ‘Mythbusters’ series, written by Cleo Feriks*
  *Mythbuster: Alexander Hoogenboom*

- Brexit or exit equal treatment?
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- Trump, Clinton and the essence of a representative democracy
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- An investigation into the local practices concerning the integration of refugees in Maastricht
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- Is a ban on outlaw motorcycle clubs effective?
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- ‘Expect no mercy’
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Institute for Transnational and Euregional cross border cooperation and Mobility / ITEM

Mailing address:
Postbus 616, 6200 MD Maastricht, The Netherlands

Visitors:
Bouillonstraat 1-3, 6211 LH Maastricht, The Netherlands
Avenue Céramique 50, 6221 KV Maastricht, The Netherlands

T: 0031 (0) 43 388 32 33
E: item@maastrichtuniversity.nl

www.twitter.com/ITEM_UM

www.maastrichtuniversity.nl/item