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Social Security and Tax Law in Cross-Border Cases

MoveS Legal Report

MoveS
FREE MOVEMENT OF WORKERS &
SOCIAL SECURITY COORDINATION

EUROPEAN COMMISSION

Directorate-General for Employment, Social Affairs and Inclusion
Directorate E — Labour Mobility
Unit E1 - Free movement of workers, EURES
Unit E2 - Social security coordination

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Social Security and Tax Law in Cross-Border Cases

MoveS Legal Report

European Commission
Directorate-General for Employment Social Affairs and Inclusion
Directorate E- Labour mobility and International Affairs

JUNE 2022

MoveS - Free movement of workers and Social security coordination

This report was prepared under the framework contract No VC/2017/0462 'Network of Experts on intra-EU mobility – Free movement of workers and social security coordination - Lot 1: Provision of legal expertise in the field of free movement of workers and social security coordination and dissemination of knowledge in this field'.

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1. EXECUTIVE SUMMARY

Social security and direct taxation both remain within the competences of the EU Member States, rather than being harmonised at European level. Nevertheless, in situations involving more than one Member State, the need for coordination of the different national systems arises. There are different ways in which this is achieved. While for social security Article 48 TFEU contains the legal base for an EU instrument to achieve this goal, for direct taxation this competence remains with the Member States, who must however act within the limits of the TFEU. In such cases as *Schumacker*[1], the Court of Justice of the European Union (CJEU) contributes to coordination where the measures adopted by Member States do not lead to results in line with the fundamental principles of the TFEU.

The interaction between tax law[2] and social security in cross-border situations has been analysed in a 2014 FreSsco Report. Since then, new developments[3] at European level consist solely of case law of the CJEU; no legislative or administrative instruments have been adopted. The CJEU clarified especially in the *de Ruyter* case[4] that specifically in relation to socially earmarked taxes, there is always only one Member State competent under Regulation (EC) No 883/2004, to levy these taxes and this authority might not be the same as the competent authority for the purposes of a Double Taxation Convention (DTC). This competence does not only refer to levies on earned income but also to any other sources of income on which the levy might be collected under national law. In relation to taxation the CJEU further developed the principles established in its past case law (especially the *Schumacker*-doctrine). Various developments have occurred at the Member State level, including legislative action and court cases, a number of which have been referred to the CJEU for preliminary rulings under Article 267 TFEU (e.g. France).

Different competences to levy taxes and social security contributions would only be unproblematic if national systems of the Member States were similar. The moment they diverge problems arise. An individual might as a result of these differences bear an excessive burden or an insufficient burden. This affects the amount, not only the levies to be paid, but also of the benefits to be granted.

Of course, different groups might be affected differently, depending on the coordination principles applicable to them under Regulation (EC) No 883/2004 and the relevant DTC. This report will give particular attention to highly mobile workers (including posted employees and persons habitually working in more than one Member State), pensioners and persons who started to telework during the Covid-19 pandemic.

Various solutions could be recommended to rectify the problems encountered. These include enhanced exchange of information and awareness raising of the stakeholders involved with a view to achieving more clarity about the rules which apply but also to encourage the decision makers to take more account of the effects of the application of one field of law upon the other. In addition enhanced cooperation between the national authorities involved could be suggested.Finally, textual clarifications could be recommended either in the framework of the OECD (which is responsible for double taxation issues) or the Administrative Commission. All of these recommendations have both advantages and disadvantages. Some of them would be rather difficult to achieve, especially when changes to the legal system are necessary. Nevertheless, they should not be excluded from the outset and might have some chance when new developments (e.g. the increased telework during the Covid-19 pandemic) occur. To summarize, further

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[1] CJEU, C-279/93, *Finanzamt Köln-Altstadt / Schumacker*, EU:C:1995:31.
[2] Throughout this report the term tax relates to direct taxation and excludes indirect taxes as VAT.
[3] This Report took into account developments until June 2021.
[4] CJEU, C-623/13, *de Ruyter*, EU:C:2015:123.

analysis and work on the relationship between taxes and social security in cross-border situations could be strongly recommended.

2. Introduction into this Report

Social security and tax law are two separate branches of law even if it is clear that they are intertwined in some respects. Problems resulting from these interactions concern individuals who can be subject to ill-adapted national rules of contributions/taxation in the context of cross-border mobility patterns. Interactions between the two branches of law, which both are politically sensitive areas that have an impact on a lot of persons, and could have unexpected budgetary consequences for Member States.[5] Depending on the techniques used, Member States can anticipate unforeseen consequences due to the complex delineation between taxation law and social security law at EU level, despite the fact that they remain competent for these two fields of law as the TFEU does not provide for their harmonisation. The impact of EU law on these two sensitive fields of national law, if it leads to results which are regarded as unfair or unbalanced, could even lead to euro-scepticism among some citizens.

The complexity of the issues pertaining to the relationships between social security coordination and taxation law arises from the fact that models of financing for social security systems diverge across the EU, ranging from purely contribution-based personal insurance models to those funded from general taxation. Finding solutions which are appropriate for all Member States and which preserve by the same token cross-border mobility principles is a tough challenge. The different bodies competent under national but also international organisational structures add to the complexity. In many Member States taxation lies within the competence of Finance Ministries and the tax administration while responsibility for social security rests with one of the Social, Health or Labour Ministries and the social security institutions.[6]

Notably, several specific categories of insured persons, namely posted workers, frontier workers, pensioners living in another Member State and highly mobile workers have all shown evidence of a disjuncture between social security and tax legislation between Member States. Research is needed on how the interplay between social security rules and taxation law affects these groups, who can be seen as being at the 'forefront' of mobility within the EU.

The FresSco report of 2014 on the relationship between social security coordination and taxation law identified issues and made some recommendations. It has to be analysed to which extent since 2014 matters have evolved. The focus has to be put on new rulings by the CJEU, further clarifying issues, decisions of national courts applying those rulings and national legislators trying to cope with the developments and adapting them to the specific national circumstances. At the same time it is interesting to find out whether structural reforms having an impact on the relationships between taxation law and social security law have been undertaken in some Member States with regard to financing social security schemes as well as to the structure of benefits granted.

On 2 October 2020, a MoveS webinar focused on the relationship between tax and social security. Participants discussed various issues such as the “contributory” side of tax-financed social security schemes. A discussion took place on the relevance of more coordination of tax law and social security law. These discussions clearly indicated that further work on this topic is necessary.

This report has the following objectives:

[5] For social security purposes « Member State » includes the 27 EU Member States, the EEA-States and Switzerland as well as the UK, whenever the coordination Regulations are applicable.
[6] Nevertheless, in some Member States these competences are bundled within one competence (e.g. the tax administration is also responsible for collecting social security contributions.

1. Updating of the FreSsco 2014 report. In **Chapter 3** this Report will briefly summarize the principles of social security and tax coordination and revisit the issues identified in the 2014 report. The report will update and analyse the case law in the area from the European Court of Justice (CJEU). The report will also analyse if new difficulties have emerged or existing ones have not been addressed.

2. Reporting on most recent developments at Member State level which are summarized in **Chapter 4** and the **Annex** to this Report.

3. Analysing in **Chapter 5** the situation of specific groups of persons which are most likely to be affected by the interplay of social security and tax coordination such as highly mobile workers (e.g. persons who are posted or habitually exercise their activities in more than one Member State) and pensioners.

4. Assessing the impact of the Covid-19 pandemic on the social security and tax system in cross-border situations.

5. Examining how the effects of the interaction between social security and taxation can be easily shown with concrete examples. For this purpose in **Chapter 5** of this Report it has to be explained, in particular, how differences in financing social security can have a direct impact on the total amount of levies to pay, the expected contribution of a person towards his or her coverage by social security, the cost to the employer but also the amount of benefits. These explanations and examples should also help the reader to find out which combinations of competences to levy taxes and social security are the most beneficial ones and where greater burdens and disadvantages arise compared to purely national situations (which in cross-border cases very often are the benchmark). It has to be assumed that some cross-border active enterprises and individuals make use of these differences to optimise their costs and benefits.

6. Thinking, as a result of these studies, about further steps which might be recommended to address the problems identified. Therefore, this Report will suggest some ways forward and also evaluate these recommendations (**Chapter 6** of this Report).

3. SETTING THE SCENE

3.1 Introductory remarks to the legal framework

The 2014 FreSsco Analytic Report on the relationship between social security coordination and taxation law (“**the 2014 FreSsco Report**”) contains a detailed description of the legal situation concerning the social security coordination and concerning direct taxes in cross-border situations.[7] The purpose of this report is not to reiterate this in detail. Nevertheless, before starting with describing the developments after 2014, it might be useful to summarize the most important elements of the legal framework. However, in the following Chapters, where specific aspects of the interdependence between taxation and social security will be further developed, more detailed descriptions of the relevant rules under the social security and tax coordination will be provided.

Both fields of law are **not subject to harmonisation** under EU-law.[8] Therefore, in the 27 Member States different national systems of social security and direct taxation exist.

[7] Chapters 2 and 3.
[8] Please note that for indirect taxes, e.g. value added tax, the TFEU provides even for harmonisation measures (Article 113 TFEU).

In purely internal situations, Member States are free to keep and develop their respective legislation.[9] The moment cross-border situations between Member States are concerned, usually one of the core principles of EU law is affected. This is the case with the free movement of persons whether that movement is a result of the pursuit of economic activity as an employed or self-employed person or movement as a Union citizen not necessarily for economic purposes.

The **TFEU has different principles** to cater for such cross-border situations and avoid disadvantages for those who are affected in the fields of social security and taxation. While for social security, a special competence and mandate has been given to the EU legislators to create a European legal framework in Article 48 TFEU, for taxation, no such general transfer of the competences to the European legislator has taken place and, thus, it is still the exclusive competence of Member States to provide solutions for these situations. Therefore, cross-border social security situations are governed by EU Regulations (now Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009, before that Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72), while taxes are still outside such EU instruments and are governed by one of the many **Double Taxation Conventions (DTCs**).[10] These DTCs usually are based on common principles, which have not been elaborated by the EU but by the OECD (**OECD Model Convention on the Taxation of Income and Capital – OECD MC**[11])

Despite these formal differences, the challenges in both fields are rather comparable. On the one hand, social security contributions as well as taxes result in a **reduction of the available income** of a person and on the other hand, benefits are granted to persons covered by the social security or tax regime. In cross-border situations the legislation of more than one Member State is involved which could – without any coordinating rules - result either in no deductions and, thus, usually also no coverage; or in deductions in more than one State with the result of considerably lower available income on the one hand, and also, limited or no benefits or an overlapping of benefits on the other hand. Both the social security Regulations and the DTCs try to avoid such situations mainly by fixing which legislation is applicable and coordinating the national social security and tax legislation.

3.2 Principles applicable to the coordination of social security systems

The definition of social security in Regulation (EC) No 883/2004 is twofold: It must be a scheme **based on legislation** (that means based on law or other statutory instruments opening legal entitlements[12]) and **linked to one of the enumerated risks** (benefits in case of sickness, maternity and equivalent paternity, invalidity, old-age, for survivors, for accidents at work or occupational diseases, unemployment, pre-retirement, death grants and family benefits[13]).[14] Thus, only contributions which are linked to one of these risks

---

[9] Of course, this does not exclude that general principles of EU law, as e.g. equal treatment of men and women are applicable also in situations, which do not stretch across the border. For social security purposes, this is laid down e.g. in Directive 79/7/EWG of 19.12.1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJEU L 1979/6, p. 24. For EU legislation on direct taxation see e.g. footnote 41 of the 2014 FreSsco Report.

[10] Double Taxation Conventions are bilateral international agreements to avoid double taxation on cross-border activities. Such DTC attribute taxing rights between the source State and residence State, according to which domestic taxing rights are waived or limited. DTC between Member States normally follow the OECD Model Convention as a common standard. For further explanations please see the 2014 FreSsco Report, chapter 3.1.1.2 Tax coordination.

[11] See https://www.oecd.org/tax/treaties/oecd-model-tax-convention-available-products.htm. The latest version is the one of 2017. Most EU Member States and EEA-States are member of the OECD. Liechtenstein is not a member. Bulgaria, Croatia, Estonia, Latvia, Lithuania and Romania are non-member countries that have published their position regarding to the OECD Model Tax Convention and Commentary.

[12] Article 1 (l) of Regulation (EC) No 883/2004.

[13] Article 3 (1) of Regulation (EC) No 883/2004.

are coordinated under Regulation (EC) No 883/2004. If a Member State provides for contributions linked to a social risk (covered by a national social protection scheme), but not one enumerated in the Regulation (as e.g. the Belgian *'timbres-intempéries'* and *'timbres-fidélité'* schemes), these are not coordinated by this Regulation. This does not exclude that the general principles of the TFEU have to be respected which could lead to similar results as the Regulation.[15]

Regulation (EC) No 883/2004 on the coordination of social security systems establishes common rules and principles which must be observed by all national authorities when applying national law. These rules ensure that the application of the different national legislations respects the basic principles of equality of treatment and non-discrimination. By doing so, it is ensured that the application of the different national legislations does not adversely affect persons exercising their right to free movement within the European Union. Nevertheless, due to the disparities between the national social security legislations, which are not overcome by the coordination provisions, moving from one Member State to another may be more or less advantageous for the insured person in terms of entitlements and contributions in any particular case.

Article 3 refers to the scope of application of the Regulation and it lists the social security benefits that are covered. Article 7 prohibits any reduction, amendment, suspension, withdrawal or confiscation of cash benefits on account of the fact that the person resides in another Member State other than that in which the institution responsible for providing benefits is situated.

Under **Regulation (EC) No 883/2004 only one Member State is competent** for the insurance coverage of a natural person and, thus, to levy contributions.[16] The general rule is the *lex loci laboris* principle[17] under which the Member State in which a gainful activity is physically exercised is the competent one. Article 11 sets out the general conflict of law rules to ensure that persons to whom the Regulation applies are subject to the legislation of a single Member State only. This ensures that persons to whom the Regulation applies are not left without social protection. At the same time, it prevents the accumulation of benefits with the same purpose due to legislation of several Member States as well as double payment of contributions due to double insurance. Two of the most important exceptions to the *lex loci laboris* rule are

i) the posting provision,[18] under which the Member State from which a person is posted remains competent if the posting conditions are fulfilled, and

ii) the provisions concerning persons who normally exercise their gainful activity in more than one Member State,[19] which determine the Member State that is competent for all the different activities.

A person who does not exercise any gainful activity is subject to the legislation of their Member State of residence.[20]

On the benefit side it is in principle[21] the Member State to whose system a person is currently affiliated that grants benefits such sickness, unemployment[22] and family

[14] E.g. CJEU C-679/16, *A*, EU:C:2018:601, paragraph 32.

[15] CJEU C-369/96 and C-376/96, *Arblade and Leloup*, EU:C:1999:575. The Court decided that it is contrary to the freedom to provide services that an employer who posts employees is subject to comparable contributions in more than one Member State.

[16] Article 11 (1) of Regulation (EC) No 883/2004.

[17] Article 11 (3) (a) of Regulation (EC) No 883/2004.

[18] Article 12 of Regulation (EC) No 883/2004.

[19] Article 13 of Regulation (EC) No 883/2004.

[20] Article 11 (3) (e) of Regulation (EC) No 883/2004.

[21] Under the pertinent provisions of Title III of Regulation (EC) No 883/2004.

[22] Setting aside the special rules for frontier workers under Article 65 of Regulation (EC) No 883/2004.

benefits, while a Member State to whose legislation a person has been subject in the past, but which is not necessarily the one currently competent, grants pensions and benefits in case of accidents at work or occupational diseases. Receipt of these benefits could open entitlement to sickness and family benefits for the insured person and also for other persons such as a family member who is subject to the legislation of another Member State.

As **pensioners** will be of special focus within this Report, it has to be noted that the competence to levy contributions may not necessarily be the same as that designated by the rules on applicable legislation. Non-active persons such as pensioners are subject to the legislation of their Member State of residence, but their sickness coverage could be within the competence of another Member State responsible for the payment of a pension to that person.[23] As the Member State granting a pension has to reimburse the sickness benefits received in other Member States, this Member State is also entitled to levy sickness contributions on that pension and on pensions granted from other Member States, if national legislation provides for such contributions.[24]

3.3 Principles applicable to the coordination of tax systems

This part describes the principles determining the attribution of taxing rights in cross-border cases. Special situations such as **posting** and **working in two of more States** will be discussed in Chapter 5 of the Report. According to the lack of an EU competence in this field, it is the Member States' responsibility to coordinate national tax systems and to avoid double taxation or non-taxation.[25] Member States are free to determine the connecting factors for the allocation of fiscal sovereignty in bilateral agreements for the avoidance of double taxation.[26] However, the case law of the CJEU has a major impact on taxation. The major case law is described in Chapter 3.6. of this Report.

As there is no unified system in the EU to coordinate the different tax systems of Member States reference has to be made to the principles of the most commonly used **OECD MC**.[27]

Double taxation can be avoided by means of Double Taxation Conventions (DTCs) or by means of national tax law or both. A DTC is a bilateral agreement between two States. DTCs can be based on the OECD MC, however deviations from this model are possible. Especially in case of cross-border workers some countries deviate from the OECD MC. An example is the French-Belgian DTC. A DTC is according to Article 1 of the OECD MC applicable on persons who are resident in one of the contracting States (**residence State**) who receive income from the other contracting State (**source State**). Only one contracting State can be the residence State. In case of double residency, the **tie-breaker rule** laid down in Article 4 of the OECD MC can be used. According to Article 4 of the OECD MC the following decisive factors are taken into account.

[23] If no pension is granted from the Member State of residence, which would open entitlement to benefits in kind there, it is the Member State which pays the pension which is competent to bear the costs of the pensioner (Article 24 of Regulation (EC) No 883/2004).
[24] Article 30 of Regulation (EC) No 883/2004 and Article 30 of Regulation (EC) No 987/2009.
[25] See Article 5 (3) TEU. So far, in CJEU tax law cases the principle of subsidiarity is not stressed.
[26] CJEU case C-241/14, *Bukovansky,* EU:C:2015:766, paragraphs 37 and 38. CJEU case C-336/96, *Gilly*,EU:C:1998:221. Also see CJEU case C-602/17, *Sauvage and Lejeune,* EU:C:2018:856; the fact that it had been decided to make the taxing power of the State of source of the income dependent on the physical presence of a resident in the territory of that State does not constitute discrimination or different treatment (free movement of workers).
[27] Articles of the Model Convention as they read on 21.11. 2017. Article 16 of the OECD MC concerns directors' fees and Article 17 of the OECD MC concerns entertainers and sportspersons. These activities are outside the scope of this report.

> Firstly, one has to look at in which State a person has a permanent home available. In case a person has a permanent home in two States, he or she shall be deemed to be a resident only of the State with which his or her personal and economic relations are closer, the so-called centre of vital interests.
>
> Secondly, if the State in which a person has the centre of vital interests cannot be determined, or he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has a habitual abode.
>
> Thirdly, in case a person has a habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national.
>
> And finally, in case a person is a national of both States or of neither of them, the competent authorities of the contracting States shall settle the question by mutual agreement.[28]

In summary, the DTCs become applicable if a person **resides in one State and receives income from another State**. The competence to levy taxes is given – depending on the kind of income – either exclusively to the State of residence, to the source State (from where the income is generated) or to both States. In the latter case of double taxation an overburdening with taxes has to be avoided either by using the **exemption method** or the **credit method**.[29]

Income from employment is in principle taxable in the taxpayer's State of residence unless the work is carried out in another State, in which case the State of residence can avoid double taxation with the exemption or credit method.[30]

The right to levy the taxes reverts to the State of residence if the three cumulative conditions of Article 15 (2) of the OECD MC are fulfilled:

> a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and
>
> b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
>
> c) the remuneration is not borne by a permanent establishment which the employer has in the other State.

The term 'employer' is not defined in the OECD MC. Therefore, according to Article 3 (2) of the OECD MC the State of employment will apply its own domestic law to determine whether the entity resident in that State pays or if some other entity which pays the salary is to be regarded as an employer for the purpose of Article 15 (2) (b) OECD MC.[31]

Remunerations derived by a resident of a Contracting State who is employed as a member of the **regular personnel of a ship or aircraft**, where that activity exercised

[28] Cf. Article 11 (1) (b) of Regulation (EC) No 987/2009 in which one of relevant factors is the Member State in which the person is deemed to reside for taxation purposes.

[29] Further explanation including some examples can be found in the 2014 FreSsco Report under Chapter 3.1.1.2.

[30] Article 15 (1) and Articles 23 A and 23 B of the OECD MC.

[31] Where they are defined differently for purposes of different laws of a State, the meaning given to income tax purposes shall prevail over all others. *L. de Broe et al.,* Interpretation of Article 15(2)(b) of the OECD Model Convention: "Remuneration Paid by, or on behalf of, an Employer Who is not a Resident of the Other State", Bulletin for international fiscal documentation, IBFD Publications, Amsterdam, Nederland, Vol. 54 (2000), No. 10, p. 505.

aboard a ship or aircraft operated in international traffic, other than aboard a ship or aircraft operated solely within the other Contracting State, shall be taxable only in the residence State (Article 15 (3) of the OECD MC).

Only the so-called **183-days rule**[32] is an exemption from the competence of the State where the work is carried out and in such cases the taxation right remains exclusively with the State of residence. This 183-days rule could be regarded as the counterpart to the posting provision under Regulation (EC) No 883/2004.

In the case of a self-employed person Article 7 of the OECD MC is applicable. Profits of an enterprise of a Contracting State are taxable only in that State unless the enterprise has a **permanent establishment (PE)** in the other Contracting State. The definition of a PE is set out in Article 5 of the OECD MC.

Salaries, wages and other elements of remuneration paid by a Contracting State or a regional or a local authority thereof to an individual in respect of services rendered to that State, subdivision or authority shall be taxable only in that State. However, such income shall be taxable in the state of residence when the individual is a resident of that State and is a national of that State or did not become a resident of that State solely for the purpose of rendering the services.[33]

Pensions, as a rule, are only taxable in the State of residence of the pensioner.[34] In this situation there is no double taxation. However, several countries have a provision for taxation at source in their DTCs due to the fact that e.g. pension contributions are deductible from the taxable income.[35] Civil servants, who receive a pension and other similar remuneration paid by a Contracting State, regional or a local authority, are taxable only in that State, unless the individual is a national of the State of residence.[36]

Regarding social security benefits there is no special provision in the OECD MC. In that case Article 21 (1) OECD MC can be applicable, which provides that elements of the income of a resident of a Contracting State, wherever arising, and not dealt with in the foregoing Articles of the OECD MC shall be taxable only in the State of residence. However some countries have specific provisions in their DTCs regarding social security benefits.[37]

Tax advantages for the purpose of this report are to be understood as those "benefits" (as a counterpart to the reduction of the income by the deduction of taxes they reduce these deductions or even are paid out to the persons concerned) that are linked to one of the risks covered by Regulation (EC) No 883/2004 – in particular those designed to reduce the family expenses or the costs of a disability or invalidity. In principle, they are granted by the State which is competent to levy the tax. Notably, the CJEU has decided to apply some of the principles of the TFEU to tax advantages and, therefore, they have a "European dimension".

The CJEU has reasoned that it is predominantly the task of the State of residence to take into account the situation of a person, which could lead to tax advantages (based e.g. on the aggregate income and the personal and family circumstances).[38] The case is different if the taxpayer receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of

[32] Article 15 (2) of the OECD MC. For further details see in the 2014 FreSsco Report under Chapter 3.1.3.2.
[33] Article 19 of the OECD MC.
[34] Article 18 of the OECD MC.
[35] See e.g. Article 18 of the Dutch-German DTC.
[36] Article 19 (2) of the OECD MC.
[37] E.g. the Netherlands have taken into account the social security contributions in Article 18 of the Dutch-Belgian DTC and in Article 17 of the Dutch-German DTC.
[38] Case C-279/93, *Schumacker*, EU:C:1995:31.

employment, with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances. If the taxpayer receives the major part[39] of the income from a gainful activity exercised outside the state of residence, it would then be for the state of source to take into account the citizen's personal and family circumstances. If the income is received from more than one State other than the State of residence, the latter is competent to grant its tax advantages, unless this is transferred to another State under a DTC.[40]

Besides the direct application of the provisions of the TFEU, as elaborated by the CJEU, also secondary legislation of the EU, namely **Regulation (EC) No 492/2011**[41] could have importance as it provides for equal treatment concerning tax advantages for non-resident workers,[42] which is not easy to reconcile with the judgments of the CJEU. The situation becomes even more complex when a tax advantage is at the same time a social security benefit coordinated by Regulation (EC) No 883/2004, which might e.g. be the case with tax advantages for children, which fulfil the condition to be regarded as family benefits.[43]

3.4 Grey zone – levies in-between taxes and social security contributions

As has been shown in the 2014 FreSsco Report[44] some Member States have created levies which under the national definition and system are taxes, but, which at the same time are clearly dedicated to finance social security ("**socially earmarked taxes**"). The main question is how such levies should be coordinated? If they are considered to be social security contributions, from a European perspective, they have to be coordinated under Regulation (EC) No 883/2004. If they are considered not to be social security, they may be coordinated in a different way, usually as taxes under the DTCs. The classification is crucial, as different consequences will ensue. Different Member States could be competent and if coordination has to be done under Regulation (EC) No 883/2004, only one Member State is competent to levy which is not necessarily the case under DTCs.

Taking into account the importance of this classification it is not astonishing that the CJEU had to decide this question on various occasions. At the time of the 2014 FreSsco Report the CJEU had made the following findings:

The **French social debt repayment contribution -** ***contribution pour le remboursement de la dette sociale*** (**CRDS**), which under French national law is considered to be a tax, was held to be a social security contribution as it is intended to finance social security benefits and, therefore, has to be coordinated under the social security Regulations.[45] The CJEU held that it does not matter that the payment of the levy does not create entitlement to benefits for the payer and that the fund into which this levy has to be paid is not a social security institution. The final destination of this levy, which is to cover the deficit of some social security institutions, is sufficient. The same applies to the **French general social contribution -** ***contribution sociale***

[39] Many states have a fixed threshold, e.g. 90% or 75%.
[40] CJEU case C-385/00, *de Groot*, EU:C:2002:750
[41] Regulation (EU) No 492/2011 of 5.4.2011 on freedom of movement for workers within the Union, OJEU No L 2011/141, p. 1.
[42] Article 7(2).
[43] CJEU case C-177/12, *Lachheb*, EU:C:2013:689, where such an advantage has been regarded as social security benefit, or case C-303/12, *Imfeld and Garcet*, EU:2013:822, where a comparable benefit was treated as tax benefit.
[44] For further details see in the 2014 FreSsco Report under Chapter 4.2.1.
[45] CJEU case C-34/98, *Commission v. France*, EU:C:2000:84.

généralisée **(CSG)**[46] - and the **Belgian moderation contribution -** ***cotisation de modération***[47]*.* In contrast to these decisions the CJEU decided that the **German artists' social charge -** ***Künstlersozialabgabe***[48] - is not a contribution covered by the social security Regulations as those who have to pay this levy in the cases brought before the Court are never the artists which can benefit from the social security scheme financed by this charge.

When a levy falls under the scope of Regulation (EC) No 883/2004 as a social security contribution, this has a double consequence in that only the Member State competent under Title II of that Regulation is entitled to levy these contributions and also income gained in another Member State can be subject to such levies even if national law would not provide for that.[49] This applies also if a DTC provides for another competence. However, this does not lead to a situation in which DTCs can be totally ignored. The CJEU accepted that a Member State waives its right (which could be even regarded as obligation) to subject foreign income to its socially earmarked taxes (this case, again, dealt with the CRDS and the CSG in France) under a DTC even if under the social security Regulations this Member State is the competent one.[50]

3.5 Developments since the 2014 FreSsco Report concerning social security

The legal framework did not change in the meantime, as Regulation (EC) No 883/2004 and 987/2009 were not amended concerning their core principles. The ongoing **reform of the two social security Regulations**[51] will not affect this topic, as it will not deal with the interplay of the Member States' social security and tax schemes.

However, developments can be reported on **clarifications made by the CJEU**. In the past, the delineation between levies covered by the social security Regulations (including socially earmarked taxes) and those which remained outside its scope as "pure" taxes was tackled by the CJEU and some clarity could be achieved.

The new challenge for Member States which had socially earmarked taxes was the question whether the competences laid down by Regulation (EC) No 883/2004 concerns only income gained from gainful activities (which is usually the base for standard social security contributions) or also from any income achieved by the person subject to the social security legislation of a Member State? The CJEU clarified also this issue. In addition, one important new ruling concerning the granting of tax credits in connection with the payment of social security contributions has to be mentioned.

3.5.1 Case law of the European Court of Justice since 2014

3.5.1.1 The ruling in the *de Ruyter* case

In this case income from assets (e.g. real estate, purchase of life annuities or investment income) was at issue, which under French law is also the basis for specific levies (again i.a. the **CSG and the CRDS**) which had already been declared by the CJEU to be contributions for the purpose of Regulation (EEC) No 1408/71. Under national law, these levies are due from any person resident for tax purposes in France. Mr. de Ruyter resided

[46] CJEU case C-169/98, *Commission v. France*, EU:C:2000:85.
[47] CJEU case C-249/04, *Allard*, EU:C:2005:329.
[48] CJEU case C-68/99, *Commission v. Germany*, EU:C:2001:137.
[49] Article 13 (5) of Regulation (EC) No 883/2004.
[50] CJEU case C-103/06, *Derouin*, EU:C:2008:185.
[51] Commission's proposal for an Amendment of Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 on procedures for implementing Regulation 883/2004 (COM(2016)815).

in France and worked in a Dutch enterprise. The French tax authorities claimed levies also on life annuities paid by Dutch insurance companies to him.

The CJEU found[52] that there is no difference to the cases examined before:

> "*Those levies therefore have a direct and sufficiently relevant link with the legislation governing the branches of social security listed in Article 4 of Regulation No 1408/71, irrespective of the absence of a link between the income from assets of taxable persons and the pursuit of a professional activity by them.*"[53] …
>
> "*That principle that the legislation of a single Member State applies in matters of social security is aimed at avoiding the complications which may ensue from the simultaneous application of a number of national legislative systems and at eliminating the unequal treatment which, for persons moving within the European Union, would be the consequence of a partial or total overlapping of the applicable legislation … .*"[54]
>
> "*It follows from the foregoing that the application of the provisions of Regulation No 1408/71 cannot be limited to the income that those persons derive from their employment relationships, as otherwise disparities would be created in the application of Article 13 of that regulation depending on the source of their income.*"[55]

Thus, the CJEU gave a clear indication that the competence of a Member State under the rules on applicable legislation (now Title II of Regulation (EC) No 883/2004) concerns not only the contributions on income stemming from a gainful activity (which lead as a rule to that competence) but to any income or assets of this person as long as levies are concerned which are earmarked for social security purposes.

3.5.1.2 The ruling in the *Hoogstad* case

In this case Belgian legislation had to be analysed by the CJEU under which **any pension (be it a statutory or arising under a supplementary pension scheme,** even if it is not established by legislation and linked to the previous employment relationship) is subject to a deduction in favour of the Belgian National Institute for Health and Disability Insurance and the Belgian National Pensions Office as a solidarity contribution.

Mr. Hoogstad had worked in Belgium and then settled in Ireland. There he received **lump sum payments from the Belgian supplementary pension schemes**. Deductions were made from these lump sum payments although he was not subject to the Belgian legislation when they were made, as Ireland was competent because of the residence there. The question raised before the Court was, if also another Member State than the one competent under Title II of Regulation (EEC) No 1408/71 could levy such contributions (there was no dispute whether these Belgian contributions fall under the Regulation or not) from **benefits which do not fall under the material scope of that Regulation**, as e.g. supplementary pensions based not on "legislation"[56].

> The CJEU held: "*In the present case, it must be noted that, in accordance with the provisions of Article 13(2)(f) of Regulation No 1408/71, Mr Hoogstad, as a retired person residing in Ireland, is subject to the social security legislation of that Member State and cannot therefore be made subject by another Member State,*

[52] CJEU case C-623/13, *de Ruyter*, EU:C:2015:123.
[53] Case *de Ruyter*, paragraph 29.
[54] Case *de Ruyter*, paragraph 37.
[55] Case *de Ruyter*, paragraph 38.
[56] Which is the case when e.g. second pillar pensions are based on collective agreements or other agreements within one enterprise.

> *as regards, in particular, supplementary pension benefits, to the legal provisions imposing contributions which have a direct and sufficiently relevant link with the legislation governing the branches of social security listed in Article 4 of Regulation No 1408/71*."[57]

In addition, the Court had to decide if the principle under which a **pension-paying Member State is entitled to collect contributions for the coverage of the sickness risk**, when this Member State is competent to cover the costs of the benefits in kind in the Member State of residence,[58] could have an impact on this sole competence of the Member State of residence. The Court stated that "*… it cannot be inferred from the existence of substantive rules on the rights of pensioners, which are not in any way applicable to retirement or supplementary pensions that are based on agreements … that the levy of social contributions on such supplementary pensions is compatible with the principle, laid down in Article 13(1) of Regulation No 1408/71, that only one legislation is applicable.*"[59]

Therefore, such contributions can only be deducted by the Member State competent (now) under Title II of Regulation (EC) No 883/2004, even if benefits are concerned which are not within the material scope of this Regulation, and even if the Regulation would allow another Member State to deduct sickness insurance contributions from a pension (which has to be covered by the material scope of this Regulation) paid by this other Member State.

3.5.1.3 The ruling in the *Eschenbrenner* case

In this case the consequences of the attribution of taxing rights of a benefit had to be analyzed. Mr. Eschenbrenner was a French national, living in France and working in Germany as a frontier worker. According to the French-German DTC the German income will be taxed in France. In 2012 Mr Eschenbrenner asked for an **insolvency benefit**. Employees working in Germany can claim an insolvency benefit for unmet wage claims over three months prior to the employer becoming insolvent. According to the French-German DTC this benefit is taxed in Germany. The gross salary is reduced by the income tax applicable in Germany. For Mr Eschenbrenner, the amount of the insolvency benefit was lower than the actual net salary after applying the French income tax rates. The way in which the amount of the insolvency payment was determined was in dispute before the Court. Because German income tax was withheld Mr Eschenbrenner received a lower insolvency benefit than if the French rates had been applied. German employees receive a benefit equivalent to 100% of their previous net salary. The German court asked for a preliminary ruling. This preliminary ruling concerned the interpretation of Article 45 TFEU and Article 7 of Regulation (EU) No 492/2011 .

The CJEU ruled that there is no infringement of Article 45 TFEU and Article 7 of Regulation No 492/2011. It is permissible for Germany to deduct income tax from the wages to be taken into account when calculating the insolvency benefit.

> "*As regards the compatibility of such a result with* Article 45 TFEU and Article 7 of *Regulation No 492/2011, it must be noted that, as was stated in paragraph 28 of the present judgment, in the present case, the power to tax the insolvency benefit belongs, in accordance with the Tax Convention, to the Federal Republic of Germany. The fact that that State exempts that benefit from tax, while requiring for the calculation of its amount a deduction corresponding to income tax at the rate in force in that State, does not alter in any way the finding that the national*

[57] CJEU case C-269/15, *Hoogstad*, EU:C:2016:802, paragraph 39.
[58] Article 33 of Regulation (EEC) No 1408/71 or Article 30 of Regulation (EC) No 883/2004.
[59] Case *Hoogstad*, paragraph 42.

> *legislation at issue falls, in essence, within that State's power to tax."*[60] Therefore, there is a disparity, which is allowed.
>
> "*Thus, given the disparities between the Member States' legislation in this field, a worker's decision to rely on his freedom of movement under, in particular, Article 45 TFEU, can, depending on the circumstances, be more or less advantageous for such a worker from a tax point of view (see, by analogy, concerning the principle of non-discrimination, judgments of 15 July 2004, Lindfors, C-365/02, EU:C:2004:449, paragraph 34, and of 12 July 2005, Schempp, C-403/03, EU:C:2005:446, paragraph 45; of freedom of establishment, judgments of 6 December 2007, Columbus Container Services, C-298/05, EU:C:2007:754, paragraph 51, and of 28 February 2008, Deutsche Shell, C-293/06, EU:C:2008:129, paragraph 43; as well as free movement of capital, judgment of 7 November 2013, K, C-322/11, EU:C:2013:716, paragraph 80)."*[61]

The fact that the **insolvency benefit is not equal to the net salary results from the difference in tax rates in the Member State** to which the taxing authority over the salary has been assigned, in this case France, and the Member State to which the taxing authority over the insolvency benefit has been assigned, in this case Germany. It is irrelevant in this regard that Mr. Eschenbrenner cannot make a claim against his employer because of the difference in wages.

3.5.1.4 The ruling in the *de Lobkowicz* case

This case did not concern Regulation (EC) No 883/2004 as **a former EU civil servant** was involved, but again, levies under French law, especially the **CSG and CRDS**, were at issue. Mr. de Lobkowicz was charged with these levies on income from real estate. The CJEU recalled that EU officials are subject to the joint social security scheme of the EU institutions and not to the schemes of the Member States.[62] This EU scheme also provides for a uniform tax on wages and emoluments paid by the European institutions and an exemption from national taxes.[63] It is only the EU, which has the competence to establish the rules for EU officials in respect of their social security obligations (which is similar to the distribution of competences under the social security obligations).[64]

Therefore, the Court concludes, that "*national legislation, such as that at issue in the main proceedings, which subjects the income of an EU official to contributions and social levies specifically allocated for the funding of the social security schemes of the Member State concerned, therefore infringes the exclusive competence of the European Union under Article 14 of the Protocol and the relevant provisions of the Staff Regulations, in particular those which prescribe mandatory contributions to the funding of a social security scheme by EU officials*".[65]

The fact, that under French legislation these levies are classified as taxes and that they are levied on income from real estate, does not change these conclusions.[66]

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[60] Case *Eschenbrenner*, paragraph 41.
[61] Case *Eschenbrenner*, paragraph 46.
[62] CJEU case C-690/15, *de Lobkowicz*, EU:C:2017:355, paragraph 36.
[63] Case *de Lobkowicz*, paragraph 41.
[64] Case *de Lobkowicz*, paragraphs 44 and 45.
[65] Case *de Lobkowicz*, paragraph 46.
[66] Case *de Lobkowicz*, paragraph 48.

3.5.1.5 The ruling in the *Jahin* case

Mr. Jahin resided and worked in China (where he was also socially insured). France deducted various levies (including the **CSG**) on income from real estate and on capital gains realised on the transfer of immovable property in France. The rulings of the CJEU up until now dealt only with persons subject to the social security scheme in another Member State or of the European institutions but not with those, subject to the social security scheme of a third country. The link to EU law was made by the referring national court with reference to Articles 63 to 65 TFEU (free movement of capital) and the fact that an EU citizens covered by the social security scheme of another Member State is treated differently compared to one subject to the social security scheme of a third state. The CJEU began by stating that under Article 63 TFEU "*all restrictions on the movement of capital between Member States and between Member States and third countries are to be prohibited*."[67] The free movement of capital also includes investment in property within the territory of a Member State by non-residents.[68]

The Court found that the difference in treatment depending on whether the person is subject to the social security scheme of another Member State or a third state"*…is liable to dissuade natural persons affiliated to a social security scheme of a third country other than the EEA Member States or the Swiss Confederation from making investments in immovable property in the Member State whose nationality they hold and is, therefore, liable to hinder the movement of capital from such third countries to that Member State."*[69]

Nevertheless, such a restriction on the free movement of capital may be justified. The Court held that decisive question was, "*whether, as regards the collection of levies such as those at issue in the main proceedings, there is an objective difference in situation, in terms of their residence, between an EU national covered by a social security scheme of a Member State other than that of the Member State concerned and a national of that Member State affiliated to a social security scheme in a third country, other than an EEA Member State or the Swiss Confederation*".[70]

> The CJEU concluded that the "*principle that the legislation of a single Member State applies in matters of social security is designed, as regards EU nationals who move within the European Union, to avoid the complications which may ensue from the simultaneous application of a number of national legislative systems and to eliminate the unequal treatment which would be the consequence of a partial or total overlapping of the applicable legislation … . It follows from the foregoing considerations that there is an objective difference between, on the one hand, the situation of a national of the Member State concerned who resides in a third country other than an EEA Member State or the Swiss Confederation and is affiliated to a social security scheme in that third country and, on the other hand, the situation of an EU national affiliated to a social security scheme of another Member State, in so far as that latter national alone is liable to benefit from the principle that the legislation of a single Member State only is to apply in matters of social security, as laid down by Article 11 of Regulation No 883/2004, by reason of his movement within the European Union."*[71]

Therefore, this difference in treatment, depending on the social security scheme to which a person is subject to, can be justified. Thus, the Court clarified that the principles developed in the past by the CJEU concerning levies as the French CSG or CRDS concern

[67] CJEU case C-45/17, *Jahin*, EU:C:2018:18, paragraph 20.
[68] Case *Jahin*, paragraph 22.
[69] Case *Jahin*, paragraph 28.
[70] Case *Jahin*, paragraph 35.
[71] Case *Jahin*, paragraphs 41 and 42.

only persons subject to the legislation of another Member State[72] (or the EU institutions) and does not concern the levy on income from capital in respect of persons subject to the social security scheme of a third State.

3.5.1.6 The ruling in the *Dreyer* case

This case again concerned the French **CSG and CRDS**. Mr. and Mrs. Dreyer were living in France and tax residents there. Mr Dreyer, who is now retired, spent his entire career working in Switzerland. He and his wife were insured under the Swiss social security scheme. They were asked to pay the CSG, the CRDS and other related levies under French law in respect of assets in the form of income from capital in France. Mr Dreyer objected these requests. In consequence thereof the CJEU was asked if those French levies which are meant to finance two specific French benefits (the "*allocation personnalisée d'autonomie*" - personal independence allowance - 'the APA' and the "*prestation compensatoire du handicap*" - disability compensation allowance - 'the PCH') are covered by Regulation (EC) No 883/2004, as the calculation of these benefits depends on the recipients' level of resources or varies according to their resources (and, therefore, it is questionable if these benefits are social assistance and, thus, falling outside the material scope of Regulation (EC) No 883/2004). If Regulation (EC) No 883/2004 applies this would hinder France to ask for these levies as it would not be the competent Member State.

> The CJEU found that "*a recipient's resources are not taken into account in conferring entitlement to the APA and PCH, but for the method of calculating those benefits, since the benefits must be granted if the applicant satisfies the conditions for their eligibility, irrespective of his resources. It is therefore clear from those provisions of the Social Assistance Code that a recipient's resources are not taken into account in conferring entitlement to the APA and PCH, but for the method of calculating those benefits, since the benefits must be granted if the applicant satisfies the conditions for their eligibility, irrespective of his resources. It follows from the foregoing considerations that taking into account a recipient's resources for the sole purpose of calculating the actual amount of APA or PCH on the basis of legally defined, objective criteria does not involve an individual assessment by the competent authority of the recipient's personal needs*."[73]
>
> The CJEU concluded: "*In the light of all of the foregoing considerations, the answer to the question referred is that Article 3 of Regulation No 883/2004 must be interpreted as meaning that benefits, such as the APA and the PCH, must, for the purposes of their classification as 'social security contributions' within the meaning of that provision, be regarded as granted without any individual assessment of a recipient's personal needs, since the recipient's resources are taken into account for the sole purpose of calculating the actual amount of those benefits on the basis of legally defined, objective criteria.*"[74]

Thus, also this attempt to exclude some elements of the GSG and CRDS from the competences under Regulation (EC) No 883/2004 failed as the CJEU clearly stated that the benefits which are financed by these levies **cannot be regarded as social assistance** (which would exclude the from the material scope of Regulation (EC) No 883/2004). Therefore, from this judgement it can be deducted again that it is only the Member State competent under Title II of Regulation (EC) No 883/2004 which is allowed to collect these levies.

[72] Including the EEA States and CH.
[73] CJEU case C-372/18, *Dreyer*, EU:C:2019:206, paragraphs 36 – 38.
[74] Case *Dreyer*, paragraph 41.

3.5.1.7 The ruling in the *Zyla* case

The *Zyla* case related to the question of which Member State is allowed to apply its provisions in the grey zone which lies between social security and taxation.

In the Netherlands, **social security contributions are levied together with income tax**. This so-called "**combined tax**" can be reduced by a "**combined tax credit**", which consists of the sum of the income tax credit and the social security contributions credit. In first instance, the social security contributions credit reduces social security contributions. Where the social security contributions credit exceeds the amount of social security contributions, it can also be set off against income tax.

The provision at issue in *Zyla* stipulated that the social security contributions credit would be granted in proportion to the period during which a person paid social security contributions in the Netherlands. Ms. Zyla worked and paid social security in the Netherlands for the first half of 2013, after which she took up residence in Poland, where she did not work. Her social security contributions credit for 2013 was reduced accordingly, which she contested.

> The CJEU was asked: "*Must Article 45 TFEU be interpreted as precluding legislation of a Member State under which a worker who, pursuant to Regulation (EEC) No 1408/71 […]or Regulation No 883/2004, is insured under the social security system of the Member State concerned for part of a calendar year, and who, when the contributions for that insurance are levied, is entitled to only a portion of the contributions component of the general tax credit which is determined on a time-proportionate basis in relation to the period of insurance, if that worker, for the remainder of the calendar year, was not insured under the social security system of that Member State, and was resident in another Member State for the remainder of the calendar year and earned (virtually) his entire annual income in the first-mentioned Member State?"*

After restating some generalities about the free movement of workers, the CJEU felt the need to decide whether the provision at issue related to tax or social security, so as to determine which EU law rules apply to the Dutch pro rata rule.[75] Only persons liable for social security contributions can be entitled to the social security contributions credit. Considering that the proceeds of the levy at issue specifically and directly funded social security schemes, the case concerned a social security measure, to be analysed in the light of EU social security law only.[76] As the CJEU found EU law on income tax not to be applicable, the Court saw no need to engage with Ms. Zyla and the Commission's argument that *Schumacker* (for further details see Chapters 3.3. and 3.6. of this Report) might be relevant.[77] Instead, the CJEU analysed the measure in the light of EU social security law and found it to be compliant with Article 45 TFEU. Essentially, Ms. Zyla was only treated differently (compared to a person subject for the whole year to Dutch legislation) for the second half of 2013, when she was in a situation objectively different from that of a person still insured under Dutch social security law. Therefore, the provision is neither discriminatory nor a non-discriminatory obstacle to the free movement of workers.

3.5.2 Short summary of the developments concerning social security

Most clarifications were brought by the CJEU to the definition of **socially earmarked taxes** and the question in which situations and from which income they can be levied

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[75] CJEU case C-272/17, *Zyla* , EU:C:2019:49, paragraphs 27 and following.

[76] At paragraphs 32-33, the CJEU clarified that this finding is not invalidated by the fact that, where it exceeds the paid social security contributions, the social security contributions credit is converted into a tax credit.

[77] For an argument that CJEU case C-279/93, *Finanzamt Köln-Altstadt v Schumacker*, EU:C:1995:31, would have been of little avail, see Opinion of AG Campos Sánchez-Bordona in Case C-272/17, *Zyla*, EU:C:2018:562, paragraphs 68-71.

under Regulation (EC) No 883/2004. Starting with the French CSG and CRDS the CJEU had various occasions to draw the borderline between social security contributions and taxes. It has to be assumed that these rulings lead to more clarity and had also an important impact on national courts (which can be seen by the replies of the MoveS national experts under Chapter 4.1.2. of this Report).

The **following conclusions can be drawn from these CJEU rulings**:

- Levies which are used to finance benefits covered by Regulation (EC) No 883/2004 are also covered by this Regulation, even if, under national laws this levy is regarded as tax; this is also valid if the levies are only indirectly used to finance social security benefits (e.g. if they are paid to a fund which covers the deficit of some social security institutions).

- The nature of the “income” on which levies are based is irrelevant. Social security contributions can therefore be levied on income derived from assets, dividends, pensions which are not covered by the material scope of Regulation (EC) No 883/2004[78] or immoveable property.

- Only the Member State competent under Regulation (EC) No 883/2004 is entitled to collect these levies; this sole competence applies as well to the right to levy contributions under Title II of Regulation (EC) No 883/2004 but, it could be assumed, also e.g. under Article 30 of this Regulation (if it is levied on a pension within the material scope of the Regulation).

- Only if there is no hypothetical link between the group of persons who have to pay the levy and those who can benefit from the social security scheme financed by these levies, they are not coordinated under Title II of Regulation (EC) No 883/2004.[79]

These principles apply not only to a person in a cross-border situation but also to a person who worked in an EU institution.

3.6 Developments since the 2014 FreSsco report concerning taxation law

3.6.1 *Schumacker*-line of case law

Since the 2014 FreSsco report in which the *Schumacker* case was described, the main principles of the *Schumacker*-doctrine can be summarized as follows.

The *Schumacker* case[80] concerned a Belgian resident who received no income in his State of residence, worked as an employee in Germany which taxed his income. Germany did not take into account his personal and family circumstances (ability to pay) in the State of residence (Belgium) when determining his tax liability. The main preliminary question concerned the possible infringement of Article 48 of the EEC Treaty (nowadays: Article 45 TFEU) : "*Is it allowed for Germany to impose a higher level of income tax on a natural person of Belgian nationality, whose sole permanent residence and usual abode is in Belgium and who has acquired his professional qualifications and experience there, than on an otherwise comparable person resident in Germany, if the former commences employment in Germany without transferring his permanent residence to Germany*?"[81]

The CJEU ruled that:

[78] Because the pensions are based not on legislation in the sense of Article 1(l) of Regulation (EC) No 883/2004.
[79] As it is the case e.g. with the German *Künstlersozialabgabe*.
[80] CJEU case C-279/93, *Schumacker*, EU:C:1995:31.
[81] Case *Schumacker*, paragraph 19.

'In relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable.

Income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence. Moreover, a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is more easy to assess at the place where his personal and financial interests are centred. In general, that is the place where he has his usual abode. Accordingly, international tax law, and in particular the Model Double Taxation Treaty of the Organization for Economic Cooperation and Development (OECD), recognizes that in principle the overall taxation of taxpayers, taking account of their personal and family circumstances, is a matter for the State of residence.

The situation of a resident is different in so far as the major part of his income is normally concentrated in the State of residence. Moreover, that State generally has available all the information needed to assess the taxpayer's overall ability to pay, taking account of his personal and family circumstances.

Consequently, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory since those two categories of taxpayer are not in a comparable situation.'[82]

The CJEU concluded that in general **the situation of residents and non-residents is not comparable**. It is the State of residence which has to take into account the personal and family circumstances of the taxpayer first. If that is not possible due to the fact that the resident derives entirely or almost exclusively his/her income in the source State, then the latter must take into account the personal and family circumstances. The CJEU followed this principle in several cases.[83]

The question is what can be considered as '*entirely or almost* exclusively' in the context of treating a non-resident taxpayer as a resident taxpayer*.* The CJEU never indicated a percentage. The court refers to this criterion without any concrete figures in several cases, starting in the *Schumacker*-case and e.g. in the *X* case in the following way: In case the State of source has to treat the non-resident taxpayer as a resident taxpayer this State has to take into account the overall ability to pay taxes (deductible mortgage interest) and personal ability to pay tax or the personal and family circumstances.[84] As a consequence of the *Schumacker*-ruling The European Commission has proposed a threshold of 75%.[85]

Some Member States like Austria, Germany and the Netherlands use a threshold of 90% to fulfil this criterion. Other Member States, for example Belgium, use the 75%, recommended by the Commission. The threshold of 90% was discussed in the ***Gschwind* case**. The taxpayer received 42% of his income in his State of residence. The CJEU found that this percentage enabled the State of residence to take into account his personal and family circumstances.[86] Special attention can be given to the ***Zurstrassen* case**.[87] In this case the possibilities of a discrimination under the TFEU and under Article 7 of Regulation (EEC) No 1612/68[88] had to be examined. Not only overt discrimination based on nationality is prohibited by the TFEU but also all covert forms of discrimination

[82] Case *Schumacker,* paragraphs 31-34.
[83] Also see CJEU case C-182/06, *Lakebrink,* EU:C:2007:452, CJEU case C-527/06, *Renneberg,* EU:C:2008:566, CJEU case C-39/10, *Commission vs. Estonia*, EU:C:2012:282.
[84] CJEU case C-283/15, *X,* EU:C:2017:102, paragraphs 26 and 30-31.
[85] See the Recommendation of the European Commission (97/97/EC) of the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident (OJEU L 1994/39, p. 22).
[86] CJEU case C-391/97, *Gschwind*, EU:C:1999:409, paragraphs 28-29.
[87] CJEU case C-87/99, *Zurstrassen,* EU:C:2000:251.
[88] The current provision is Article 7 (2) of Regulation (EC) No 492/2011.

which, by applying other distinguishing criteria, lead in practice to the same result. In the *Zurstrassen* case, under the legislation of Luxemburg the entitlement of married couples to joint assessment to tax liability is subject to a residence condition for both spouses, which Luxemburgish nationals will be able to satisfy more easily than nationals of other Member States who have settled in Luxemburg in order to pursue an economic activity there. This condition does not ensure the equal treatment required by the Treaty.

In the ***de Groot* case**[89] the CJEU held that if a person earns income in more than one State other than the State of residence, it is the residence State that must take into account the personal and family circumstances. However, the State of residence may transfer this responsibility to one of the working States concerned by means of bi- or multilateral agreements. According to the CJEU, the State of residence might be released by such an agreement from its obligation to take into account the personal and family circumstances of the taxpayer, if one or more of the employment States grant the social or tax benefits with respect to the income taxed by them.

Since the 2014 FreSsco Report the Court decided the following important cases:

3.6.2 The ruling in the *Kieback* case

In the *Kieback* case[90] the situation was slightly different from the above mentioned cases. In this case two **consecutive working States** were involved. In the above mentioned cases there was a State of residence and one State of source. In the *Kieback* case the taxpayer only worked for three months in a Member State and the rest of the year in a third State. The question is how to deal with the *Schumacker*-doctrine in a situation in which a taxpayer only worked a part of a tax year in a Member State and worked another part in a third State.

The concrete case was the following: Mr. Kieback lived in Germany and he worked for three months in the Netherlands, thereafter he emigrated to the United States, stopped working in the Netherlands and started working in the United States. All these facts occurred in the year 2005. In case he would have worked in the Netherlands for the rest of 2005 he would have been able to deduct the negative income related to his German dwelling in the Netherlands. The question is whether the source Member State has to take the personal and family circumstances into account in case a taxpayer only worked for a part of the tax year in that Member State and worked for the rest of the tax year in another State? In other words should the *Schumacker*-doctrine be applied for a part of the tax year or should the total income of the tax year be taken into account?[91]

The CJEU concluded the following:

> *'In paragraph 34 of the judgment in Lakebrink and Peters-Lakebrink (C-182/06, EU:C:2007:452), the Court stated that the scope of the case-law arising from the judgment in Schumacker extends to all the tax advantages connected with the non-resident's ability to pay tax which are granted neither in the State of residence nor in the State of employment (judgment in Renneberg, C-527/06, EU:C:2008:566, paragraph 63).*
>
> *Thus, in relation to such tax advantages connected with a particular taxpayer's ability to pay tax, the mere fact that a non-resident has received, in the State of employment, income in the same circumstances as a resident of that State does not suffice to make his situation objectively comparable to that of a resident. It is additionally necessary, in order to establish that such situations are objectively comparable, that, due to that non-resident's receiving the major part of his income*

[89] CJEU case C-385/00, de *Groot*, EU:C:2002 :750.
[90] CJEU case C-9/14, *Kieback*, EU:C:2015:406.
[91] Case *Kieback*, paragraph 15.

> *in the Member State of employment, the Member State of residence is not in a position to grant him the advantages which follow from taking into account his aggregate income and his personal and family circumstances.*
>
> *When a non-resident leaves during the course of the year to pursue his occupational activity in another country, there is no reason to infer that, by sole virtue of that fact, the State of residence will not therefore be in a position to take the interested party's aggregate income and personal and family circumstances into account. Moreover, since, after leaving, the party concerned could have been employed successively or even simultaneously in several countries and been able to choose to fix the centre of his personal and financial interests in any one of those countries, the State where he pursued his occupational activity before leaving cannot be presumed to be in a better position to assess that situation with greater ease than the State or, as the case may be, the States in which he resides after leaving.*[92]
>
> *It follows that a non-resident taxpayer who has not received, in the State of employment, all or almost all his family income from which he benefited during the year in question as a whole is not in a comparable situation to that of residents of that State so account does not require to be taken of his ability to pay tax charged, in that State, on his income. The Member State in which a taxpayer has received only part of his taxable income during the whole of the year at issue is therefore not bound to grant him the same advantages which it grants to its own residents.'*[93]

In conclusion, the *Schumacker*-doctrine should be applied on a whole tax year only. This conclusion is not affected by the fact that the residence State is a non EU Member State.

3.6.3 The ruling in the *X* case

In this case a **self-employed person, a football agent, received no income in his State of residence**, Spain. He received 40% of his income in Switzerland and 60% of his income in the Netherlands. As a result the *Schumacker*-criterion could not be applied in Switzerland nor in the Netherlands due to the fact that the taxpayer is not earning his entirely or almost exclusively income in one State of source. In other words, how to deal with the *Schumacker*-criterion in such a case? The CJEU did not elaborate on this issue before this case.

Since Mr. X could not have his personal and family circumstances taken into account by that State within which he receives 40% of his income, nor by that within which he receives 60% of the total of his income from his economic activities, namely the Netherlands, it is clear that he is adversely affected by CJEU case-law.

> *'That conclusion would not be invalidated if X were, in addition, to have received the remainder of his income in that year within a State other than the Kingdom of the Netherlands and the Kingdom of Spain. As stated by the Advocate General in points 47 to 53 of his Opinion, the fact that a taxpayer receives the major part of his income within not one but several States other than that where he is resident has no effect on the application of the principles deriving from the judgment of 14 February 1995, Schumacker (C-279/93, EU:C:1995:31). What remains the decisive criterion is whether it is impossible for a Member State to take into account, for the calculation of tax, the personal and family circumstances of a taxpayer in the absence of sufficient taxable income, although such circumstances can otherwise be taken into account when there is sufficient income.'*[94]

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[92] Case *Kieback*, paragraphs 27-29.
[93] Case, *Kieback*, paragraph 34.
[94] CJEU, *X*, paragraphs 41 and 42.

> *'It follows, in particular, that the freedom of the Member States, in the absence of unifying or harmonising measures adopted under EU law, to allocate among themselves their powers to impose taxes, in particular to avoid the accumulation of tax advantages, must be reconciled with the necessity that taxpayers of the Member States concerned are assured that, ultimately, all their personal and family circumstances will be duly taken into account, irrespective of how the Member States concerned have allocated that obligation amongst themselves. Were such reconciliation not to take place, the freedom of Member States to allocate the power to impose taxes among themselves would be liable to create inequality of treatment of the taxpayers concerned which, since that inequality would not be the result of disparities between the provisions of national tax law, would be incompatible with freedom of establishment (see, to that effect, judgment of 12 December 2013, Imfeld and Garcet, C-303/12, EU:C:2013:822, paragraphs 70 and 77).'*[95]

The CJEU concluded that any Member State within which a self-employed person receives income from economic activity has to enable him or her to claim there an equivalent right of deduction, in proportion to the share of that income received within each Member State of activity. In that regard, a 'Member State of activity' is any Member State that has the power to tax such income from the activities of a non-resident as is received within its territory, irrespective of where the activities are actually performed. The fact that the taxpayer received a part of his income in a non-Member State is of no relevance.

3.6.4 The ruling in the *Bechtel/Bechtel* case

In this case Mr. and Ms. Bechtel were residents of Germany. They were subject to a joint assessment for income tax purposes. Ms. Bechtel, a French national, was a civil servant in France. Ms. Bechtel's **gross salary had been reduced by several French levies**: withholding tax, contribution to the civil service pension, contribution to the civil service pension in respect of monthly allowance for expertise, contribution to the mutual fund for tax officials, additional insurance contributions for invalidity and survivors' pensions for finance officials, employee contributions for health insurance, and additional pension contributions for the public sector.

Under the French-German DTC the income of Ms. Bechtel was exempt. For that reason the German tax authority excluded the income from the income tax basis of assessment. However, the gross remuneration was included in the calculation of the tax rate, pursuant to the progressivity clause. Under the applicable German legislation, the expenses included in Ms. Bechtel's gross remuneration do not fall substantively within the scope of the concept of 'occupational expenses'. On the other hand, the subscriptions relating to the mutual fund for tax officials, additional insurance for invalidity and survivors' pensions for finance officials, the additional pension for the public sector and the employee contribution for health insurance may fall within the scope of the special expenses, because those expenses correspond to the cases referred to in the German legislation. However, the German legislation makes the deduction of expenses subject to the condition that they have no direct economic link with tax-exempt income. Contributions cannot be deducted for the purposes of determining the special tax rate applicable to the disposable income of Mr. and Ms. Bechtel, in accordance with German legislation. The question is whether the prohibition on deducting such expenses as special expenses is compatible with EU law.

The applicants claimed that the proceedings should be assessed in the light of Article 18 TFEU. The CJEU found that:

[95] Case *X*, paragraph.46.

'In that regard, it should be observed at the outset that it is settled case-law that Article 18 TFEU, which lays down a general prohibition of all discrimination on grounds of nationality, applies independently only to situations governed by EU law for which the TFEU lays down no specific rules of non-discrimination […].

In relation to the right of freedom of movement for workers, the principle of non-discrimination was implemented by Article 45 TFEU […].'[96]

'The refusal to deduct additional pension and health insurance contributions levied in France, such as those at issue in the main proceedings, leads, first, to the taxable income of taxpayers, such as the appellants in the main proceedings, being increased, and secondly, to the special tax rate being calculated on the basis of that increased taxable income, without that rate being corrected by taking those contributions into consideration in another way, which would not have been the case if Mrs Bechtel had received her wages in Germany instead of France.

Such disadvantageous treatment is liable to discourage resident workers from looking for, accepting or remaining in employment in a Member State other than their Member State of residence.

National legislation, such as that at issue in the main proceedings, which makes the deduction of provident expenses subject to the condition that they must not have a direct economic link with exempt income, in a situation such as that at issue in the main proceedings, therefore constitutes a restriction on the free movement of workers, prohibited, as a rule, by Article 45 TFEU.'[97]

The CJEU reiterated the main aspects of the *Schumacker*-doctrine and applied it to the situation of a couple in which one of the partners worked as a civil servant in another Member State than their State of residence:

'*The Member State of employment is required to take into account personal and family circumstances only where the taxpayer derives almost all or all of his taxable income from employment in that State and where he has no significant income in his Member State of residence, so that the latter is not in a position to grant him the advantages resulting from taking account of his personal and family circumstances (see, inter alia, judgments of 14 February 1995, Schumacker, C 279/93, EU:C:1995:31, paragraph 36; of 14 September 1999, Gschwind, C 391/97, EU:C:1999:409, paragraph 27; of 16 May 2000, Zurstrassen, C 87/99, EU:C:2000:251, paragraphs 21 to 23; of 12 December 2002, de Groot, C 385/00, EU:C:2002:750, paragraph 89, and of 12 December 2013, Imfeld and Garcet, C 303/12, EU:C:2013:822, paragraph 44).'*[98]

However, Ms. Bechtel was in a situation comparable to a resident taxpayer receiving income in the State of residence. The CJEU concluded that it is contrary to Article 45 TFEU, when a taxpayer residing in a Member State and working for the public administration of another Member State may not deduct additional contributions paid in another State from the income tax basis of assessment in her Member State of residence. This is the case when Germany does not allow the deduction of French additional pensions and health insurance contributions, while wages merely increase the tax rate to be applied to other income. Important for the CJEU is the fact that '*German residents who receive wages and salaries from Germany from which provident*

[96] CJEU case C-20/16, *Bechtel and Bechtel*, EU:C:2017:488, paragraphs 30 and 31.
[97] Case *Bechtel and Bechtel,* paragraphs 49-51.
[98] Ibid., paragraph 56.

contributions comparable to those at issue in the main proceedings are withheld, could deduct those contributions from their taxable income'.[99]

3.6.5 Short summary of the developments concerning taxing law

Since the 2014 FreSsco report more clarifications are made regarding to the *Schumacker*-doctrine, like the question how to deal with the *Schumacker*-criterion in case of triangular situations. In cases where two States of employment are involved the *Schumacker*-doctrine has to be followed and the factors which affect the ability to pay have to be taken into account proportionally by each working State. Other CJEU case law can be seen as a confirmation of the *Schumacker*-doctrine, but not only from the perspective of the work State but also from the perspective of the residence State (e.g. the *Bechtel and Bechtel* case). In summary, the *Schumacker*-doctrine continues to develop.

4. DEVELOPMENTS IN THE MEMBER STATES SINCE THE 2014 FRESSCO REPORT

It is interesting to note what developments took place since the 2014 FreSsco report in the Member States both with respect to legislation and case law. In order to gain a better overview on some specific issues related social security and taxation in cross-border situations. Of course, we must also bear in mind the impact of the Covid-19 pandemic on cross-border situations in the social security and tax field.

These developments and the situation in the different Member States have been analysed by the MoveS national experts on the base of a questionnaire which was circulated by MoveS national experts. As this Report focuses on specific aspects on the interaction between social security and taxation in areas such as the impact on pensioners, this questionnaire was also used to collect information on the economic impact on a person depending on the different levels of taxes and social security contributions in the Member States. This Chapter sums up the most important developments and the national situation reported. Some of the information gathered will not be presented in this Chapter but **Chapter 5**, as it is directly linked to the questions dealt with there. In the following part only the main conclusions are provided. The concrete situation in the different Member States has been elaborated in the **Annex to this Report**.

4.1 Question 1 [Changes to national legislation]

Significant changes in national legislation

Chapters 2.1.3., 2.2.2. and 2.3.2. of the 2014 FreSsco Report contain the description of the situation in the Member States. MoveS national experts have been invited to report on significant changes under national legislation in relation to the funding of social security (e.g. has there been a shift from contributions to earmarked taxes or general taxes) and in relation to the creation or abolition of tax benefits which have (also) social security purposes since the 2014 Report. Therefore, the following questions have been addressed to the MoveS national experts and the general remarks deductible from these answers are mentioned below.

4.1.1 Question 1 a) [Developments of financing methods]

Q. Have there been any developments concerning the definition of contributions and the financing methods of social security benefits (contributions/taxes) since 2014?

[99] Case *Bechtel and Bechtel*, paragraph 47.

The feedback is that no fundamental reforms of the financing mechanism of social security have taken place in the Member States since 2014. This means that the CJEU rulings did not have an impact on the way social security schemes were organized and financed in the majority of Member States, which could have been expected. Of course, Member States where national courts or the CJEU have decided on some of the financing systems in a way, which is not consistent with national policy aims or where these judgements lead to administrative problems, were more tempted to reform these schemes, which is especially valid for France (concerning the CGS and CRDS). It has to be mentioned that if there have been reforms or amendments to the financing system they were caused to a greater extend by the Covid-19 Pandemic.

4.1.2 Question 1 b) [Developments of socially earmarked taxes]

Q. Have there been any developments concerning the use of socially earmarked taxes for the financing of social security benefits since 2014?

It is not possible to discern a common trend concerning socially earmarked taxes in Member States. Some Member States have reduced them (but it is not clear whether this was due to the various rulings of the CJEU) while others have created new ones. Establishing new levies on foodstuffs deemed to be unhealthy, which are designed to financing social security schemes is still considered appropriate by some Member States. Nevertheless, whether these levies are subject to coordination under Regulation (EC) No 883/2004 is still not clear in all situations.

4.1.3 Question 1 c) [Developments of tax benefits]

Q. Have there been developments concerning tax benefits meant to cover social security risks since 2014?

MoveS national experts reported various tax measures, which reduced the tax burden for persons in receipt of social security benefits in specific circumstances. Although not all of these measures correspond to the definition used in the 2014 FreSsco Report,[100] they have, nevertheless, been included in this Report, for the sake of completeness. Frequently these measures consist of the application of reduced tax rates or even a total exemption from taxes of certain social security benefits. In many cases, the measures focus on benefits for children and persons with disabilities, but sometimes also on other social security benefits.

4.2 Question 2 [Developments of case law]

4.2.1 Question 2 a) [Delineation between contributions and taxes]

Q. Has there been national case law on the delineation between levies which are covered by Regulation (EC) No 883/2004 (including ear-marked taxes) and those levies which are not coordinated by this Regulation?

Many different national case law has been reported by the MoveS national experts. Very often, these rulings are related to or follow on from implementation of the rulings of the CJEU mentioned in Chapter 3. of this Report (which is especially the case in relation to France). Interestingly, the case law of some Member States, where for taxation purposes it is relevant when social security contributions have been paid, a demarcation line had to be drawn with respect to levies paid in other States, if they can be assimilated to social security contributions in the first Member States or not.

[100] 2014 FreSsco Report, Chapter 1.2.

4.2.2 Question 2 b) [Contestation of double burden]

Q. Is there any national case-law in which claimants have contested the double burden arising from their liability for social security contributions in one Member State and their liability for taxes, which are partly or even mainly (but not exclusively) destined to finance social security schemes, in another Member State?

MoveS national experts reported only a few rulings of national courts on this topic. Nevertheless, such rulings reveal how complicated the interaction between tax and social security can be and that the parallel application of DTCs and Regulation (EC) No 883/2004 or bilateral social security agreements do not always lead to satisfactory results for individuals.

4.3 Question 3[101] [Impact of the Covid-19 pandemic]

Q. During the Covid-19 pandemic working from home (home-office) has become much more used. In cross-border situations this could have an impact under the existing legal instruments on the competences for social security and/or taxation (changes of competence due to the shift of the work to another Member State). Many efforts have been made to avoid a different competence only because of the consequences of more home-office due to the pandemic. Has there been a combined effort or a separate one, but with comparable aims, by the social security and tax authorities in your country in this respect?

During the Covid-19 pandemic, many Member States have taken measures regarding existing legal instruments on the competence of social security authorities (e.g. Regulation (EC) No 883/2004) and/or taxation (e.g. DTCs) in cases where a cross-border worker has been required or encouraged to work from home due to the crisis.

The question required to be answered was: Has there been a combined effort or a separate one, but with comparable aims, by the social security and tax authorities in the reporting State in this respect? The answers of the experts to this general question are very diverse. Most Member States have taken measures. In general, the answers reflect a distinction between tax measures and social security measures. Regarding the measures related to social security a distinction can be made between social security contributions and social security benefits. In social security as well as in taxation many Member States decided to ignore additional home-office work due to the pandemic, whenever this would result in a change of competence to levy contributions and/or taxes. This topic is further examined under Chapter 5.6. of this Report.

4.4 Question 4 [Facilitation due to the Covid-19 pandemic]

Q. Due to the Covid-19 pandemic employers ran into problems to meet their obligations towards the tax and social security institutions to pay tax and/or contributions. Member States reacted with various measures to facilitate and/or suspend these obligations. In cross-border situations, this might be difficult. Has there been a combined effort or a separate one, but with comparable aims, by the legislators, social security and tax authorities in your country in this respect during the pandemic and afterwards?

Across Member States, many measures have been introduced to meet problems regarding social security contributions and tax obligations for persons and enterprises hit by the pandemic. In the answers received to the question many measures to facilitate and/or suspend the obligations to pay tax and/or contributions are described. In some

[101] The questionnaire to MoveS national experts contained an additional question No 3 concerning the financing of the healthcare system which is incorporated into Chapter 5.4. of this Report. This led to a re-numbering of the questions under Chapter 4.

Member States a combined effort by legislators, social security and tax authorities is not done. In general, there are no specific measures taken regarding cross-border situations. Although some measures can still have effects in the period after the pandemic, none of the Member States described measures or planned initiatives to handle cross-border situations after the pandemic.

4.5 Question 5 [Combined efforts of authorities]

Q. Are there combined efforts of social security and tax authorities to better control cross-border cases (e.g. via data mining and data matching, bilateral Memorandum of understanding [MoUs] or agreements, exchange of information between tax and social security authorities etc.)?

MoveS national experts did not give much feedback on this issue, although it could be said that in many Member States such cooperation takes place. With respect to whether combined efforts are taken by social security and tax authorities of the Member States to control better cross-border cases (e.g. via data mining and data matching, bilateral agreements, exchange of information between both authorities etc.), there appears to be much difference between the Member States in terms of practice and awareness.

4.6 Question 6 [Information on tax on benefits]

Q. Are there efforts by national authorities to inform the person who is granted a social security benefit that it might be taxable in a cross-border situation (i.e. in the Member State of residence)?

We are informed that such information usually can be obtained from the national tax authorities, either on the relevant national home pages or on request. In some Member States social security institutions also provide such information for all States of residence of beneficiaries or at least for the (neighbouring) States with which they have most cases.

5. CHALLENGES FROM THE DIFFERENT COORDINATION OF SOCIAL SECURITY AND TAXES

5.1 Taxes and contributions in cross-border cases

5.1.1 Situation in the Member States

If all Member States had the same tax and social security schemes, including the same rates of levies, and migration flows were perfectly symmetrical, there would not be problems when a person is subject under Regulation (EC) No 883/2004 to the social security scheme of Member State A while under the DTC between the States involved Member State B is competent to levy taxes. The differences between tax and social security schemes, and the asymmetry of migration flows, give rise to mismatches.

5.1.2 Mismatches

DTCs prevent double taxation and double non-taxation. Regulation (EC) No 883/2004 prevents double social security contributions and double non-contributions.[102] However, that does not entirely prevent people from being obliged to contribute twice or contributing very little, to the funding of social security schemes. Two (fictitious) Member States might seek to achieve the same goal – levying 15% on a € 2,000 salary to fund their social security schemes – but do so in different ways: one social security scheme is mostly tax-financed, while the other is funded through social security contributions.

[102] As we have seen, social security contributions include socially earmarked taxes.

Member State 1 might levy low social security contributions (5%) but dedicate a third of income taxes to funding social security schemes (10%, i.e. 33% * 30%). Member State 2 might only fund its social security schemes through social security contributions of 15%. As Table A shows, a person subject to the tax and social security law of either Member State 1 or Member State 2 therefore pays the same amount to fund social security schemes

Table A	MS 1	MS 2
Income tax rate	30%	20%
Income tax	€ 600	€ 400
Percentage of income taxes funding social security	33%	0%
Income tax funding social security	€ 200	€ 0
Income tax not funding social security	€ 400	€ 400
Social security contribution rate[103]	5%	15%
Social security contributions	€ 100	€ 300
Total percentage of income funding social security	15% (= [30% * 33%] + 5%)	15% (= [20% * 0%] + 15%)
Total sum funding social security	€ 300 (= 15% * € 2,000 or = € 200 + € 100)	€ 300 (= 15% * € 2,000 or = € 0 + € 300)
Net salary	€ 1,300 (= € 2,000 - € 600 - € 100)	€ 1,300 (= € 2,000 - € 400 - € 300)

5.1.2.1 Excessive burden

A person subject to the income tax law of Member State 1 and the social security law of Member State 2 experiences a double burden (Table B). In Member State 1, he or she pays € 600 by way of income tax, of which € 200 funds social security schemes. In Member State 2, he or she pays € 300 in social security contributions. In total, 25% (rather than 15%) of the salary serves to fund social security schemes.

Table B	MS 1	MS 2

[103] It is assumed that taxes and social security contributions are levied in parallel and simultaneously on the gross income. Accordingly, social security contributions are not deduced from the income liable for tax or vice versa.

Income tax rate	30%	
Income tax	€ 600	
Percentage of income taxes funding social security	33%	
Income tax funding social security	€ 200	
Income tax not funding social security	€ 400	
Social security contribution rate		15%
Social security contributions		€ 300
Total percentage of income funding social security	25% (= (30% * 33%) + 15%)	
Total sum funding social security	€ 500 (= 25% * € 2,000 or = € 200 + € 300)	
Net salary	€ 1,100 (= € 2,000 - € 600 - € 300)	

The net salary is reduced by € 200 per month compared to the situation detailed in Table A. Yet, the person concerned does not enjoy an increase in social security protection. In other words, while the person pays taxes in only one Member State and pays social security contributions in only one Member State, he or she contributes to the financing of social security schemes twice: € 200 per month by way of income tax funding social security in Member State 1, and € 300 per month by way of social security contributions in Member State 2.

Member State 1 receives € 200 per month by way of income tax funding its social security schemes. Yet, as it is not competent under Regulation (EC) No 883/2004, it may well have no social security duties towards the person concerned.[104] Accordingly, that sum is an undue advantage for that State.

In this example, Member State 2 is not detrimentally affected, because its income tax does not serve to fund its social security schemes. If some of its income taxes were destined to fund social security schemes, Member State 2 would experience a shortfall in social security revenue that is not compensated by any reduction in social security responsibilities.

5.1.2.2 Insufficient burden

A person in the opposite situation – i.e. subject to the social security law of Member State 1 and the income tax law of Member State 2 – would contribute too little to the financing of social security schemes (Table C). In Member State 2, he or she would pay € 400 by way of income tax, without contributing to the financing of social security. In

[104] There may be such duties for e.g. unemployment benefits.

Member State 1, he or she would only pay 5% by way of social security contributions. As a result, 5% (rather than 15%) of the salary serves to fund social security schemes.

Table C	MS 1	MS 2
Income tax rate		20%
Income tax		€ 400
Percentage of income taxes funding social security		0%
Income tax funding social security		€ 0
Income tax not funding social security		€ 400
Social security contribution rate	5%	
Social security contributions	€ 100	
Total percentage of income funding social security	5% (= (20% * 0%) + 5%)	
Total sum funding social security	€ 100 (= 5% * € 2,000 or = € 0 + € 100)	
Net salary	€ 1,500 (= € 2,000 - € 400 - € 100)	

The person in question reaps an undue advantage. His or her salary is € 200 higher than it would be if he or she were subject to the social security and tax law of either Member State 1 or Member State 2 (see Table A). Yet, he or she does not suffer any loss in social protection. While the person concerned does pay taxes and social security contributions, the amount is too low to finance his or her level of coverage.

Member State 2 is not affected by this situation, because none of its income tax serves to fund social security schemes. If some of its income tax did fund social security schemes, Member State 2 would reap an undue advantage: it would obtain funds without responsibilities.[105]

Member State 1 is negatively affected in this scenario. It would have expected 15% rather than 5% of the salary to fund its social security schemes. The shortfall is due to the fact that it lacks the power to levy income taxes, a third of which would have served to finance its social security schemes.

The gains and losses are starkest when comparing a person in Table C, whose net salary is € 1,500 to a person in Table B, whose net salary is € 1,100 (i.e. 73% of € 1,500).

[105] See previous footnote.

It is worth bearing in mind that this case study is simplified.[106] It is assumed that only one Member State has taxing rights and that social security contributions are not deductible. An assumption which often does not hold true in practice is that one Member State does not at all rely on income taxes to finance its social security schemes.

5.1.3 Options for recalibrating the burden?

The above problem is due to the fact that (i) the social security law of one Member State applies and the tax law of another and that (ii) at **least one of those States funds its social security schemes (partly) through taxes**.

If none of the States involved finance their social security through taxes, no issue would arise. The position is therefore particularly acute where one Member State mainly finances its social security schemes through social security contributions while the other relies heavily on income taxes to that end. To make this point is not to suggest a harmonisation of the funding of social security schemes,[107] but rather to help identify the most egregious issues.

If the social security and tax law of the same State applies, no issue would arise (see above, Table A). The more the social and fiscal conflict rules are alike, the more likely that they designate the same State. As we have seen, there is a degree of similarity between the conflict rules in social security and tax law. For instance, the State of employment has the power to levy social security contributions and income taxes, unless the person is a posted worker. There are suggestions to align the fiscal and social conflict rules further.

While a **pan-European coordination of income taxes** is politically, if not legally, unfeasible, *F. Pennings and M. Weerepas* propose to align the conflict rules in respect of posting and non-resident workers, laid down in DTCs, to those of Regulation (EC) No 883/2004.[108] This would be an ambitious and arduous endeavour, given that it requires countless DTCs to be renegotiated.[109] While further approximation should not be ruled out, it must be recognised that transplanting a social security logic to tax law can be problematic. The mere fact that there are frictions with social security law, on its own, does not suffice to justify a complete redesign of deeply ingrained principles of international tax law.

Conversely, **Regulation (EC) No 883/2004 could be adapted to resemble the OECD MC**. For instance, it has been suggested to introduce the 183-days rule in the social security regulations.[110] While there might be reasons to shorten the length of postings under Regulation (EC) No 883/2004,[111] again this is a much broader debate of which the friction with tax law is only one part. *D. Pieters* has argued for the introduction of the *lex loci domicilii* for cost compensating benefits, such as health care and family

[106] For a real-life case study, see *J. Tepperová*, "Personal Income Tax and Social Security Coordination in Cross-Border Employment – A Case Study of the Czech Republic and Denmark", European Journal of Social Security (2019) 23.

[107] For such a proposal, see *P. Schoukens and D. Pieters,* "Harmonising Social Security Financing", in: *T. Laenen, B. Meuleman, A. Otto, F. Roosma and W. Van Lancker (*ed.), Leading Social Policy Analysis from the Front: Essays in Honour of Wim van Oorschot, Leuven, 2021.

[108] *F. Pennings and M. Weerepas*, "Towards a convergence of coordination in social security and tax law", EC Tax Review (2006) 215, 222.

[109] *H. Verschueren*, "Regulation 883/2004 and Bilateral Tax Agreements", EC Tax Review (2012) 98, 109.

[110] *D. Pieters,* "Towards a Radical Simplification of the Social Security Co-ordination: Exploratory study on possibilities of replacement of Regulations (EEC) Nos. 1408/71 and 574/72 in order to simplify the EC Co-ordination of social security schemes", in: P. Schoukens (ed.), Prospects of Social Security Co-ordination, Leuven, 1997, 195-196.

[111] For discussion, see *N. Rennuy,* "Shopping for social security law in the EU", Common Market Law Review (2021) 13, in particular 22-25; *P. Schoukens and D. Pieters,* "The Rules Within Regulation 883/2004 for Determining the Applicable Legislation", European Journal of Social Security (2009) 81, 107.

benefits.[112] Those benefits are predominantly tax-financed. Again, the ramifications of such proposals not only for tax law, but also social security law, ought to be carefully evaluated.

H. Verschueren proposes that Member States should conclude **Article 16 Agreements**.[113] Article 16 of Regulation (EC) No 883/2004 enables the competent authorities of two or more Member States to conclude agreements derogating from the conflict rules laid down in Title II "in the interest of certain persons or categories of persons".[114] The breadth of the possibilities offered by Article 16 is apparent from the *Brusse* case, in which the CJEU stated that "*the Member States enjoy a wide discretion to which the only limitation is regard for the interests of the worker*."[115] Because Article 16 Agreements must be in the interests of the person concerned, they cannot correct situations where he or she contributes too little to the funding of social security (Table C).

Concretely, Article 16 Agreements could be put in place where a person overpays (Table B), so that the Member State levying income tax – partly to fund its social security schemes – becomes competent for social security law. Effectively, Member State 1 would levy both income taxes and social security contributions, reducing the total funding of social security schemes from 25% (Table B) to 15% (Table A). Because Article 16 Agreements allow to deviate only from the conflict rules of Regulation (EC) No 883/2004 (and not from DTCs), they cannot shift taxing powers from Member State 1 to Member State 2.

The 2014 FreSsco Report suggested a **supra-coordination**: "*whenever [Regulation (EC) No 883/2004 and DTCs] lead to different Member States levying contributions and taxes, this instrument could [indicate] which one has to be considered as competent for both fields*."[116] This would be a more tailored instrument, which does not require Regulation (EC) No 883/2004 to be *generally* adapted to DTCs or vice versa, but merely resolves conflicts between them.

One such rule could require a Member State which is not competent under Regulation (EC) No 883/2004 to waive its taxation rights to the extent that income taxes serve to fund its social security schemes. In Table B, that would mean that Member State 1 levies € 400 rather than € 600, because € 200 serve to fund social security schemes that grant no protection to the taxpayer. As a result, the overpayment would be eliminated. A formula would need to be devised to calculate the share of income taxes that fund social security schemes.

Another example would be a rule **vesting taxing rights with a Member State that lacks them but is competent in matters of social security**, to the extent that income tax funds its social security. In Table C, that would mean that Member State 1 can levy € 200 by way of income tax. The underpayment would be corrected.

[112] *D. Pieters*, "Towards a Radical Simplification of the Social Security Co-ordination", in: *P. Schoukens (*ed.), Prospects of Social Security Co-ordination, Leuven, 1997, in particular 189-194, 211-217. See also *H. Verschueren*, "Financing Social Security and Regulation (EEC) 1408/71", European Journal of Social Security (2001) 7, 19.

[113] *H. Verschueren*, "Regulation 883/2004 and Bilateral Tax Agreements", EC Tax Review (2012) 98, 109-110; *J. Tepperová*, "Income Tax and Social Security Coordination", European Journal of Social Security (2019) 23, 37.

[114] See further Recommendation 16 of the Administrative Commission concerning the conclusion of Agreements pursuant to Article 17 of Regulation 1408/71, OJEU C 1985/273, p. 3 (inapplicable under Regulation (EC) No 883/2004).

[115] CJEU case 101/83, *Brusse*, EU:C:1984:187, paragraph 25. The failure of the worker to affiliate himself to the schemes of the competent State does not preclude the conclusion of an Article 16 Agreement (ibid., paragraphs 24-25).

[116] *B. Spiegel, K. Daxkobler, G. Strban and A. P. van der Me*i, "The relationship between social security coordination and taxation law", FreSsco Analytical Report 2015, 58. See also D*. Pieters*, "Towards a Radical Simplification of the Social Security Co-ordination", in: *P. Schoukens* (ed.), Prospects of Social Security Co-ordination, Leuven, 1997, 217-218.

It must be noted that both of these solutions would need adapting if Member State 2 were to fund its social security schemes partially through taxation. As indicated earlier, our case study (in Chapter 5.1.2.) is based on the rather unrealistic assumption that it does not at all fund its social security schemes through taxation.

A final example is the compensation scheme of Article 27 of the DTC between the Netherlands and Belgium.[117] The Netherlands awards a tax reduction to frontier workers who are subject to Belgian income tax and reside in the Netherlands, provided the sum of the Dutch income tax, the Belgian income tax, and the social security contributions exceeds the amount that would be due, by way of contributions and taxes, if the income were wholly derived in the Netherlands. This provision seeks to alleviate excessive burdens, without depriving either State of the power to impose levies on the occupational income. More broadly, rules in **DTCs** could be tailored to the situation of the signatory States.[118] Essentially, the approach is not to replicate the rules of Regulation (EC) No 883/2004 in DTCs, but rather to **carefully identify instances of excessive or insufficient burden, and to remedy them with a tailored rule**. Such solutions could tackle the most egregious problems encountered by Member States, especially if they have relatively high migration flows. They are however unlikely to result in more than a partial solution.

The above solutions are rule-based. To what extent could case-by-case solutions be devised by decision-makers? The principle of legality would prevent decision-makers faced with *insufficient* burdens from imposing additional levies in the absence of a legal basis for doing so. Decision-makers faced with *excessive* burdens might find it easier to exercise discretion to the benefit of the individual concerned. Could the free movement rights of the TFEU even oblige them to do so?

5.1.4 Obligations to recalibrate the burden?

The individual effects on citizens will depend on the concrete tax and social security systems they are confronted with. If these difference result in large differences compared to purely national situations, can an EU citizen challenge the double burden that arises from the payment of income taxes that fund social security schemes in one Member State on top of the payment of social security contributions in another Member State (Table B)? The question is whether this would constitute a prohibited restriction of free movement rights and also which threshold would have to be surpassed to be a clear indicator for such a restriction.[119] As set out in Chapter 3.3. and 3.6. of this Report the CJEU accepts double taxation, whilst at the same time rejecting double contributions. This stark contrast renders the lawfulness of the burden represented by a mix of fiscal and social levies rather unpredictable.

5.1.4.1 Double contributions

The imposition of contribution duties in more than one Member State **is prohibited by the TFEU and Regulation (EC) No 883/2004**. The CJEU has repeatedly stated that the imposition of double contribution constitutes an obstacle to free movement.[120] Such a burden might be justified only if it grants additional social security protection.

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[117] Convention between the Kingdom of the Netherlands and the Kingdom of Belgium for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital of 5 June 2001, *United Nations Treaty Series*, vol. 2205, I-39157, 385. Cf. Protocol Article XII, belonging to the Convention between the NL and DE for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income of 12.04.2012 - Trb. 2012, 123, and Trb. 2015, 178.

[118] *J. Tepperová*, "Income Tax and Social Security Coordination", European Journal of Social Security (2019) 23, 38.

[119] For further analysis, see *H. Verschueren*, "Regulation 883/2004 and Bilateral Tax Agreements", EC Tax Review (2012) 98, 110-111.

[120] E.g. CJEU case 62 and 63/81, *Seco and Desquenne*, EU:C:1982:34; CJEU case 143/87, *Stanton*, EU:C:1988:378; CJEU case 154 and 155/87, W*olf and Dorchain*, EU:C:1988:379; CJEU case C-53/95, *Kemmler*, EU:C:1996:58; CJEU case C-272/94, *Guiot*, EU:C:1996:147; CJEU case C-369/96 and C-376/96, *Arblade and Leloup*, EU:C:1999:575.

5.1.4.2 Double taxation

The abolition of double taxation is an objective of the Treaty[121] that is mostly pursued through the conclusion of bilateral DTCs. Article 293 EC Treaty (now abolished) provided that Member States shall negotiate with one another "with a view to securing for the benefit of their nationals […] the abolition of double taxation within the Community". There is a very dense network of bilateral agreements, but still double taxation can occur. As Advocate General Colomer held, "*the fact that a taxable event might be taxed twice is the most serious obstacle there can be to people and their capital crossing internal borders*."[122] This undeniable factual obstacle to free movement is not, however, a legal obstacle: the CJEU ruled that double taxation is not, as such, contrary to the free movement rights of the Treaty.[123]

5.1.4.3 Taxation and contribution

The CJEU case-law on the TFEU is contrasting: the levying of double social security contributions is firmly rejected, whilst double taxation is tolerated. We are concerned with the financing of social security through non-earmarked taxes and through social security contributions. Bilateral conventions, which are successful in mitigating double taxation, do not generally address the combined levying of taxes and contributions.

An interesting question, which has yet to reach the CJEU,[124] is whether a Member State, which is not competent in matters of social security, can levy income tax that is in part destined to finance social security. The concurrent imposition of "**social taxation**" in one State and social security contributions in another would confront the CJEU with the inconsistency of its internal market case-law and force it to choose one approach over the other. Either it bans the double burden in a manner akin to its social case-law, or it tolerates it as is traditional in its fiscal jurisprudence. In other words, a case straddling two domains of law is torn between the logic underpinning each of those domains and ultimately necessitates a choice between both philosophies.

If the CJEU were to consider the **double burden to be a *prima facie* obstacle to free movement rights,** further questions would arise. How would it approach the issue of comparability? To what extent could objective justifications be successfully invoked?[125] Which Member State would be prevented from taxing income or subjecting it to social security contributions? Mindful of the connection between funding and benefits, it would probably be apposite to require the Member State that is not competent under Regulation (EC) No 883/2004 to lower its taxes, so as to exclude the person from "social taxes" that do not result in social protection. The CJEU or the national judge would have to determine **which share of taxation funds social security**. Should that State entirely forfeit the power to levy "social taxes", or only lower its tax burden insofar as its "social

[121] CJEU case C-336/96, *Gilly*, EU:C:1998:221, paragraph 16. Also see CJEU case C-168/19 and C-169/19, *HB en IC/Istituto nazionale della previdenza sociale (INPS)*, EU :C :2020 :338.

[122] Opinion of A.G. Colomer in CJEU case C-376/03, *D.*, EU:C:2005:424, paragraph 85.

[123] E.g. CJEU case C-513/04, *Kerckhaert*, EU:C:2006:713 (taxation of dividends); CJEU case C-67/08, *Block*, EU:C:2009:92 (inheritance tax); CJEU case C-128/08, *Damseaux*, EU:C:2009:471 (taxation of dividends); CJEU case C-96/08, *CIBA*, EU:C:2010:185 (earmarked income tax); CJEU case C-302/12, *X*, EU:C:2013:756 (vehicle tax). Critical: *G. Kofler*, "Double Taxation and European Law: Analysis of the Jurisprudence", in: *A. Rust* (ed.), Double Taxation within the European Union, Alphen aan den Rijn, 2011; *A. Rust*, "How European Law Could Solve Double Taxation", in: A. Rust (ed.), Double Taxation within the European Union, Alphen aan den Rijn, 2011.

[124] It is interesting that – although the consequences of the existing legal framework as interpreted by the CJEU can lead to results which have to be regarded as problematic from our point of view (especially when social security has to be funded in more than one Member State) – no such cases have been brought before the CJEU yet. It might be that either in reality the differences between the situation of a migrant worker and a purely internal situation are not that big, that they are rather difficult to calculate or that e.g. employers and employees have learned to live with it by increasing e.g. the salaries of the persons concerned accordingly.

[125] On the justification test in matters of direct tax law, see e.g. *A. Cordewener, G. Kofler and S. Van Thiel*, "The Clash Between European Freedoms and National Direct Tax Law: Public Interest Defences Available to the Member States", Common Market Law Review (2009) 1951.

taxes" exceed those of the State competent under Regulation (EC) No 883/2004? In the former case, would the competent Member State be allowed to impose the share of taxes that funds its social security schemes on a person over whom it has no taxation jurisdiction? Several methods exist to avoid double taxation. Which would be preferable? From a practical point of view there would be complexities for courts, social security and tax administrations, and individuals. Consider a system under which any deficit of the social security scheme has to be covered by general taxes. The exact percentage of the social security budget financed out of general taxation would only become apparent *ex post* and it would vary from year to year.

The review of the double burden under the TFEU is an exercise that is bound to be fraught with difficulties. It would take a brave Court to go down that path. One may wonder whether such Gordian knots should be cut by the judiciary.[126] Does the CJEU have the legitimacy and institutional capacity to resolve such thorny issues? But equally, could it tolerate a *prima facie* breach of the principle of equal treatment that deprives migrants of (a possibly substantial) part of their salary?

It seems that the problem cannot be fully resolved by judicial means, although it could be attenuated. A political intervention appears to be more suitable.[127]

5.2 Fiscal conditions with social security effects

National social security law sets conditions for liability for contributions and for entitlement to benefits. As will be illustrated below, those conditions might refer to tax law. Such 'fiscal conditions' then have effects on social security law. How should social security institutions of one Member State deal with these matters when the applicable tax law is that of another Member State? The following answers can already be given:

The **social security law** of the Member States can **refer to concepts and rules that are part of fiscal law** in a number of ways.

(i) Fiscal conditions can delineate the group of persons insured under social security law. For instance, unless otherwise provided by Regulation (EC) No 883/2004, non-residents are insured for certain Dutch social security schemes such as old-age pensions if they are subject to Dutch wage tax on account of their employment in the Netherlands.[128]

(ii) Fiscal conditions can determine eligibility for social security benefits. For instance, income-tested benefits might be open only to those whose income after tax remains below a certain threshold.

(iii) Fiscal conditions can have an effect on the calculation of social security benefits.[129]

Income levels often influence entitlement to means-tested benefits. In those cases, the question arises whether the relevant income to be taken into account is to be calculated before or after the imposition of tax and how to deal with tax paid under another jurisdiction.

Few provisions of the social security regulations specifically deal with fiscal notions.[130] Therefore, social security cases involving fiscal notions ought to be examined in the light of **Article 4 and Article 5 of Regulation (EC) No 883/2004**, as well as the free movement rights.

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[126] *A. P. van der Mei, G. Essers and C. Douven*, "Pensioners and the financing of cross-border health care: bottlenecks in the fields of European social security law and international tax law", European Journal of Social Law (2011) 92, 108-109.

[127] *P. Schoukens and D. Pieters*, "EU-coördinatie van socialezekerheidsbijdragen en belastingen", in: A. Van Regenmortel, H. Verschueren and V. Vervliet (ed.), Sociale zekerheid in het Europa van de markt en de burgers: enkele actuele thema's, Bruges, 2007, 585. For an argument that double taxation is soluble only by positive integration, see *P. J. Watte*l, "Passing the Buck Around: Who Is Responsible for Double Taxation?—Comments on Profs. Kofler and Rust's Analysis", in: *A. Rust* (ed.), Double Taxation within the European Union, Alphen aan den Rijn, 2011.

[128] Algemene Ouderdomswet (General Old Age Act).

[129] See e.g. CJEU case C-332/05, *Celozzi*, EU:C:2007:35.

[130] A rare example is Article 53(3)(b) of Regulation (EC) No 883/2004.

Article 5 of Regulation (EC) No 883/2004 is key, and reads as follows:

> *'Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:*
>
> *(a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;*
>
> *(b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.'*

There is no CJEU case-law dealing with fiscal conditions under this provision yet.[131]A rare case in which the CJEU dealt with fiscal conditions under provisions of EU law is ***Commission v Germany***, which concerned workers active in Germany whose income was only taxable in their State of residence pursuant to a DTC. By making a social advantage (more specifically, a savings-pension bonus) for persons insured under its statutory pension scheme conditional upon them being fully liable to tax under German law, Germany was found to breach what are now Article 45 TFEU and Article 7(2) of Regulation (EC) No 492/2011.[132] The condition of full liability to tax in Germany could not be objectively justified either on the basis of fiscal coherence or on the basis of the real link case-law, which requires a sufficient link to the State from which a benefit is claimed; indeed, the beneficiaries' affiliation to the German social security system demonstrated a sufficiently close connection to German society.

5.3 Social security conditions with fiscal effects

National tax law sets conditions for the liability for tax and the entitlement to tax advantages. These conditions might refer to social security law. An example of such a 'social condition' with effects on tax law is where income is taxed after social security contributions are deducted. The question interesting for the purpose of this Report is: How should tax institutions deal with such social conditions when the applicable social security law is that of another Member State? Two specific issues where social conditions have fiscal effects concern the fiscal treatment of social security contributions and social security benefits.

5.3.1 Fiscal treatment of social security contributions

In ***Filipiak***, the CJEU had to decide if a Member State can deduct compulsory social security contributions from taxable income of its tax residents only on the condition that they were made to its own social security scheme. In this case a Polish tax resident who was economically active in the Netherland unsuccessfully sought to deduct the contributions he paid to Dutch social security schemes from his Polish taxable income.[133] The CJEU began its analysis by noting that its answer was premised on the assumption that contributions had not been deducted from income or tax in the Netherlands. The Court held that to reduce taxable income only by the amount of Polish social security contributions but not similar contributions paid in another Member State was to treat resident taxpayers differently. Such a difference in treatment of taxpayers who are in comparable situations as regards taxation principles (as they both are subject to unlimited tax liability) is contrary to the freedom of establishment and the freedom to provide services, in the absence of an objective justification. No such justification had

[131] On Article 5 of Regulation (EC) No 883/2004, see *M. Pöltl, E. Eichenhofer and C. Garcia de Cortázar*, "The principle of assimilation of facts", FreSsco Analytical Report 2016; *N. Rennuy*, "Assimilation, territoriality and reverse discrimination: a shift in European social security law?", European Journal of Social Law (2011) 289.

[132] CJEU case C-269/07, *Commission v Germany* (savings-pension bonus), EU:C:2009:527.

[133] CJEU case C-314/08, *Filipiak*, EU:C:2009:719.

been put forward in this case. As a result, the Dutch contributions, which had not been deducted in the Netherlands, ought to be assimilated to Polish contributions. It was significant that the referring court had found the contributions in both countries to be "identical, in both their nature and purpose".[134]

What *Filipiak* is to economically active persons, ***Rüffler*** is to pensioners.[135] The CJEU was asked whether Poland could refuse to reduce a Polish tax resident's income tax by the amount of compulsory health insurance contributions, on the ground that the contributions were made to the health insurance system of another Member State. Much like in *Filipiak*, the claimant was a Polish tax resident, the contributions made in Germany were identical in nature and purpose to the Polish contributions, and it was assumed that those contributions had not already been taken into account under German tax law. The CJEU considered that treating comparable tax residents differently based on which healthcare system they contributed to amounts to a restriction of what is now Article 21 TFEU. The fact that the pensioner did not contribute to the financing of the Polish healthcare system could not constitute an objective justification. He did not burden the Polish healthcare system, as his healthcare was provided in Poland, but at the expense of the German healthcare system.

Further problems can however arise in a situation where **the amount of social security contributions and their fiscal treatment in a Member State are related**. Consider the following example of two (fictitious) Member States who levy the same total sum of social security contributions and income taxes, but do so in different ways. Member State 1 sets a higher rate of social security contributions than Member State 2, but deducts those contributions entirely from income tax. Member State 2 sets a lower rate of social security contributions, but does not deduct them from income tax.

Table D	MS 1	MS 2
Social security contribution rate	20%	18%
Income liable for social security contributions	€ 2,000	€ 2,000
Social security contributions	€ 400	€ 360
Income tax rate	10%	10%
Income liable for tax	€ 1,600 (= € 2,000 - € 400)	€ 2,000
Income tax	€ 160	€ 200
Sum of tax and contributions	€ 560 (= € 400 + € 160)	€ 560 (= € 360 + € 200)
Salary after tax and contributions	€ 1,440 (= € 2,000 - € 560)	€ 1,440 (= € 2,000 - € 560)

A person subject to both the social security and tax law of either Member State 1 or Member State 2 will pay a total of € 560 (Table D). Distortions however arise where a person is subject to the social security law of one Member State and the tax law of the other.

[134] Ibid., paragraph 65.
[135] CJEU case C-544/07, *Rüffler*, EU:C:2009:258.

A person subject to the social security law of Member State 2 would pay € 360 in social security contributions (Table E). Assuming that these contributions were not deducted from tax or income in Member State 2 and that they are sufficiently similar to its own deductible contributions, Member State 1 must deduct them from its income tax base on the basis of *Filipiak*.[136] The person is therefore liable for a total of € 524, i.e. 94% of the total that would have been due had he or she been subject to the social security law and tax law of either Member State 1 or Member State 2.

Table E	MS 1	MS 2
Social security contribution rate		18%
Income liable for social security contributions		€ 2,000
Social security contributions		€ 360
Income tax rate	10%	
Income liable for tax	€ 1,640 (= € 2,000 - € 360)	
Income tax	€ 164	
Sum of tax and contributions	€ 524 (= € 360 + € 164)	
Salary after tax and contributions	€ 1,476 (= € 2,000 - € 524)	

The opposite example also reveals a distortion (Table F). A person subject to the social security law of Member State 1 and the tax law of Member State 2 would pay a total sum of € 600, i.e. 107% of the total that would have been due had he or she been subject to the social security law and tax law of either Member State 1 or Member State 2.

Table F	MS 1	MS 2
Social security contribution rate	20%	
Income liable for social security contributions	€ 2,000	
Social security contributions	€ 400	
Income tax rate		10%
Income liable for tax		€ 2,000
Income tax		€ 200

[136] Ibid.

Sum of tax and contributions	€ 600 (= € 400 + € 200)
Salary after tax and contributions	€ 1,400 (= € 2,000 - € 600)

In sum, distortions appear because of divergences in the rates of social security contributions and their fiscal deductibility. Member States design their social security law and their tax law as a unity. It is perfectly coherent, for instance, to compensate for a high social security contribution rate with full fiscal deductibility. No problems arise as long as persons are subject to the social security and tax law of the same Member State. Distortions do however appear where persons are subject to the social security law of one Member State and the tax law of another.

The solutions to this problem are of the same kind as those explored above (see Chapter 5.1.3. of this Report). One solution would be to **model fiscal conflict rules on social conflict rules or vice versa.** However, the problems with such overhaul of international fiscal law or EU social security law remain; any approximation would be politically sensitive, technically challenging, and time consuming. The distortion is probably too minor to warrant shifting a person's social security protection from one Member State to another on the basis of an Article 16 agreement.[137] Some rules of "supra-coordination" could be introduced: they would need to identify the distortion and introduce a compensatory payment if the burden is too high, or levy an additional tax or social security contribution if the burden is too low. It must be noted that the sums, and therefore the stakes, are much lower than those encountered in Chapter 5.1. of this Report.

5.3.2 Fiscal treatment of social security benefits

Member States are free to decide whether, how and to what extent **social security benefits are subject to tax**. This choice has obvious repercussions for the beneficiary and the public purse. Member States might for instance exempt social security benefits from tax.

One question is whether a Member State can exempt some of its own social security benefits from tax, while taxing benefits of the same nature paid by other Member States.

In ***BU***, the CJEU found that the Belgian tax authorities breached Article 45 TFEU by rejecting a claim by a Belgian tax resident for an exemption from tax for a Dutch social security benefit, while a Belgian benefit of the same nature would have been exempt from tax.[138] The reason for the rejection was that the benefit was not Belgian. A distinction between tax residents on the basis of the origin of their social security benefit constitutes a restriction on the free movement of workers, for which no justification had been put forward.

The assessment of whether social security benefits are of the same nature can give rise to difficulties. ***BU*** concerned a Dutch benefit granted under the Law on insurance against incapacity for work. Under Belgian tax law, allowances granted to persons with disabilities are exempt from income tax, while allowances for incapacity to work are taxable as pensions. The Belgian authorities considered the Dutch benefit to be a (taxable) allowance for incapacity to work. The referring court qualified the benefit as an (exempt) allowance for persons with disabilities. That is the qualification upon which the preliminary question was based, and which the CJEU did not call into question. In future, the CJEU may be called to decide how similar benefits ought to be for assimilation to take

[137] It should be borne in mind that Article 16 agreements would not always be a remedy as they only allow to derogate from the conflict rules of Title II of Regulation (EC) No 883/2004, but not of those of Title III of Regulation (EC) No 883/2004 (e.g. for pensioners).
[138] CJEU case C-35/19, *BU*, EU:C:2019:894.

place in EU tax law, and to what extent it will lean on existing social security case law to that end.[139]

In ***BU*** the Belgian tax authorities made a distinction between benefits financed by Belgium and benefits which are not financed by Belgium. It is important to note that in ***BU*** the referring court did not provide any objective justification for the discriminatory treatment.

Further issues arise from the tax treatment of foreign social security benefits. The level of benefits may be determined in the light of their fiscal treatment.[140] Two (fictitious) Member States can grant the **same amount by way of *net* social security benefit** in different ways. Member State 1 grants a lower, exempt benefit; Member State 2 grants a higher, taxable benefit. Table G shows that a person subject to the social security and tax law of either Member State 1 or Member State 2 receives the same amount.

Table G	MS 1	MS 2
Social security benefit	€ 2,000	€ 2,500
Tax rate for social security benefit	0%	20%
Tax on social security benefit	€ 0	€ 500
Social security benefit after tax	€ 2,000	€ 2,000

As Table H shows, problems arise where a person is subject to the social security law of Member State 2 and the tax law of Member State 1. Member State 2 awards a high benefit, under the wrong assumption that it will be taxed at 20%. Member State 1 exempts the benefit from tax, under the wrong assumption that its amount is € 2,000. The result is a net benefit of € 2,500, amounting to 125% of the benefit that the person concerned would have received had he or she been subject to the laws of one of the two Member States.

Table H	MS 1	MS 2
Social security benefit		€ 2,500
Tax rate for social security benefit	0%	
Tax on social security benefit	€ 0	
Social security benefit after tax	€ 2,500	

[139] See CJEU case C-453/14, *Knauer*, EU:C:2016:37.
[140] *D. Pieters*, "Towards a Radical Simplification of the Social Security Co-ordination: Exploratory study on possibilities of replacement of Regulations (EEC) Nos. 1408/71 and 574/72 in order to simplify the EC Co-ordination of social security schemes", in: *P. Schoukens* (ed.), Prospects of Social Security Co-ordination, Leuven, 1997, 219.

Conversely, a person subject to the social security law of Member State 1 and the tax law of Member State 2 will receive a net benefit of € 1,600, i.e. only 80% of the benefit that either Member State 1 or Member State 2 intended. Member State 1 awards a low benefit, wrongly assuming it will be exempt from tax. Member State 2 taxes the benefit at 20%, wrongly assuming that its amount is € 2,500.

Table I	MS 1	MS 2
Social security benefit	€ 2,000	
Tax rate for social security benefit		20%
Tax on social security benefit		€ 400
Social security benefit after tax		€ 1,600

These issues would not arise if benefits were always taxed by the Member State which granted them. For most social security benefits the main rule is taxation by the Member State of residence. Article 21 (1) of the OECD MC reads: "*Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State.*" For those benefits, distortions arise when they are granted by a Member State other than the Member State of residence.

Again, a number of solutions are possible. **Unifying social and fiscal conflict rules** would be an effective solution but it comes at a high cost. To resolve these distortions, *D. Pieters* suggested introducing a directive providing that Member States which are parties to a DTC shall ensure that social security benefits are taxable only in, or at the rate of, the State granting them.[141] Rules of "**supra-coordination**" could again be tailored to the situation at hand. The excessive benefit in Table H above could be reduced to € 2,000 through specific rules on the calculation of benefits (applied by Member State 2) or through compensatory taxation (applied by Member State 1 or 2). The insufficient benefit in Table I could be increased to € 2,000 through non-taxation (by Member State 2) or by a supplement (granted by Member State 1 or 2). **Article 16 agreements** under Regulation (EC) No 883/2004 would be of little avail: they can only be used to shift the competence for social security (rather than taxation) and they cannot be used for individual benefits – as Article 16 concerns Title II of Regulation (EC) No 883/2004, the derogation cannot be limited to certain branches of social security.[142] Finally, it might be that the scenario described in Table I contravenes free movement rights.

5.4 The funding of the healthcare of pensioners

5.4.1 Social security

In an ageing society, the financing of the health care of pensioners assumes great importance. Being economically inactive,[143] pensioners are in principle subject to the

[141] Ibid., 219.
[142] *S. Devetzi,* Die Kollisionsnormen des Europäischen Sozialrechts, Berlin, 2000, 82; *B. Spiegel, K. Daxkobler, G. Strban and A. P. van der Mei*, "The relationship between social security coordination and taxation law", FreSsco Analytical Report 2015, 20; *H.-D. Steinmeyer*, "Titel II: Bestimmung des anwendbaren Rechts", in: *M. Fuchs* (ed.), Europäisches Sozialrecht, Baden-Baden, 6th edn 2013, 214.
[143] We do not consider the situation of economically active pensioners.

social security law of their Member State of residence.[144] The costs of their healthcare, however, are borne by (one of) the Member State(s) granting them a pension, which may or may not be the Member State of residence (Articles 23-26 Regulation (EC) No 883/2004). Only that Member State is entitled to make **healthcare deductions from pensions**.[145] One goal of these provisions is to ensure that a Member State bearing the costs of pensioners' healthcare is in a position to finance it. Although this may be achieved by way of contributions from the pensioner it may also be financed through taxation and that complicates matters.

5.4.2 Taxation

Which Member State has the right to tax a pension depends on a number of factors including the type of pension at issue. This report focuses on mandatory, first-pillar pensions. Pensions **from the first pillar** tend to be subject to two regimes. First, they might be subject to Article 21 (1) of the OECD MC, which gives exclusive taxing rights to the Member State of residence. A number of DTCs however deviate from the OECD MC, and instead allocate taxation rights to the source State, possibly under certain conditions.

Regarding what is referred to as **second pillar pensions** a distinction can be made between public and private pensions. Article 19 (2) of the OECD MC will apply to a pensioner who receives a public pension and other similar remuneration. According to this Article, the source State may tax the pension and the other similar remuneration. However, the pension or other similar remuneration is taxable in the State of residence if the individual is a national of that State.

Article 18 of the OECD MC applies to a pensioner who receives a private pension. A resident who is receiving a private pension is only taxable in his State of residence with regards to a second-pillar pension. In this situation there is no double taxation due to the fact that the right to tax is exclusively allocated to the State of residence. However a lot of countries have a source taxation provision in their DTCs.[146] Article 18 of the OECD MC does not provide for the deduction of pension contributions or the transfer of pension capital in case of cross-border work. Nevertheless, the Commentary on the OECD MC provides some solutions. For the taxation of pensions based especially on a capitalisation scheme (contributions are "saved" in a fund und pensions later paid out from the capital accrued) a special terminology has been developed, which is based on the following abbreviations: 'E' means "exempt", and 'T' means "taxed". Then information is given on the different phases of the building up of the pension in such a way that it is visible if tax has to be paid or if the phase is exempt from taxation. The first letter corresponds to the Payment of contributions, the second letter corresponds to the investment income and capital gain of the pension fund, and the third letter corresponds to the phase of payment of the pension benefits. It has to be noted that regarding to the second pillar pension, countries can, therefore, use different schemes of taxing, namely EET[147], ETT, ETT, TTE or TEE systems. An EET system means e.g. that the contributions are exempt or tax deductible, the investment income and capital gain of the pension fund is also exempt and the pension benefits are taxed. It has to be noted as well that the importance of the first and second pillar pensions of the Member States can differ enormously. The European Commission wants to remove any remaining tax obstacles to the single market for second pillar pension schemes.[148]

[144] Article 11 (3) (e) of Regulation (EC) No 883/2004.

[145] Article 30 of Regulation (EC) No 883/2004; see also Article 30 of Regulation (EC) No 987/2009.

[146] See e.g. Article 18 of the Dutch-Belgian DTC.

[147] Most Member States follow an EET system, however, e.g. Denmark and Sweden are following the ETT system and Germany is following the EET and TEE system as well.

[148] See for an overview of the EC initiatives, CJEU case law and infringement procedures, https://ec.europa.eu/taxation_customs/individuals/personal-taxation/pension-taxation_eu.

It is clear that when the cross-border worker is confronted with different pension schemes many tax issues arise,[149] which are outside the scope of this report. Nevertheless, two limited remarks of possible problems can be made.

In case of the deductibility from tax of cross-border pension contributions paragraph 37 of the Commentary on Article 18 of the OECD MC provides a recognition of both pension schemes of the State of residence and State of work. Contributions are deductible provided:

a. the pension scheme is established in a Contracting State;

b. the individual must not be a resident of the working State;

c. the individual must be a participant of the fund immediately before beginning to provide services in the working State;

d. the pension scheme must be recognized by the other State as such for tax purposes by that State.

A problem may arise, where the transfer is made from a pension scheme located in one Contracting State to a scheme located in the other State. In such a case, the contracting State where the individual resides may consider that the payment arising upon the transfer is a taxable benefit. A similar problem arises when the payment is made from a scheme established in a State to which the relevant DTC gives source taxing rights on pension payments arising therefrom as the State may want to apply the taxing right to any benefit derived from the scheme.

Paragraph 68 of the Commentary on Article 18 of the OECD MC offers a solution as it provides that: '*(…) any transfer of these rights or amounts to a pension scheme established in and recognised for tax purposes in that other State shall, in each State, be treated for tax purposes in the same way and subject to the same conditions and limitations as if it had been made from one pension scheme established in and recognised for tax purposes in that State to another pension scheme established in and recognised for tax purposes in the same State*'.

5.4.3 The interplay between contributions and taxes

Issues might arise for pensioners who worked in one Member State and retire to another, e.g. in terms of tax relief for pension contributions or the taxation of pension benefits. They may also be confronted with exit taxes, trailing taxes and anti-abuse rules.[150]

5.4.3.1 Different ways to finance healthcare systems

The information concerning the different Member states was collected by way of a questionnaire sent to MoveS national experts with a view to obtaining a better understanding of the impact of the relevant system of levies of the Member States to finance healthcare on gainful income or on pensions when cross-border elements are involved (e.g. when a Member State is allowed to deduct contributions also from foreign income under Title II of Regulation (EC) No 883/2004 or on pensions under Article 30 of

[149] See e.g. ***L. de Broe and R. Neyt*, "Tax Treatment of Cross-Border Pensions under the OECD Model and EU Law",** Bulletin for international fiscal documentation, IBFD Publications, Amsterdam, Nederland, Vol. 63 (2009), issue 3, p. 86-93.

[150] Ways to tackle cross-border tax obstacles facing individuals within the EU, Report of expert group, November 2015, p. 5 and 18.

Regulation (EC) No 883/2004, even if under the national law of this other pension-paying Member State no contributions are deducted from pensions). This information has to be kept in mind when reading the next Chapters of this Report. In the examples provided, fictitious national systems have been used to more clearly demonstrate the different methods of financing health care. For more real live scenarios reference could be made to the information on the different Member States in this Chapter of the Report (but, this would make the examples more complicated and less transparent).

The answers received **do not show a homogenous picture**. Therefore, the summary of the data received must be read with caution. Some Member States are not able to indicate the percentage of healthcare coverage split into the different sources (especially when this percentage is not fixed by law, but varies from year to year depending on the actual subsidy from the general budget). The percentage might cover only benefits in kind or also benefits in cash as e.g. sickness or maternity allowances, it could cover only healthcare in the narrow sense but might also include long-term care. The figures have also to be interpreted differently if the public healthcare systems covers nearly the whole population or if a big part of the population is covered by private schemes, which have different financing mechanism.

Member State	Healthcare financing				
	contributions	Earmarked taxes	General tax	Percentage on income[151]	Percentage on pensions
AT	82.9%			7.65%	5.10%
BE	80%[152]	13%[153]		13.074%[154]	3.55%
BG	63%		35%	8%	[8%][155]
CH	Rest of costs		50%[156]	Premiums[157]	Premiums[158]
CY	2.65% to 4.70%[159]			2.65%[160]	2.65%[161]

[151] When different percentages are applied to different groups of the economically active population, the rate for employees is indicated.
[152] Based on the budget for 2020.
[153] Sum taken in advance from the revenue generated by VAT.
[154] Only global contributions for all branches; percentage is calculated from last expenses for healthcare.
[155] They are paid only by the state and not deducted from pensions.
[156] 50% of hospitalisation.
[157] No percentage of income.
[158] No percentage of pension.
[159] The percentages concern the financing of the General Healthcare System (GHS) under the General Healthcare System (Amending) Law of 2017 and they are not specific to coordination Regulation benefits: 2.65% for employees on their salaries; 2.90% for employers, including the State as an employer on the salaries of every person employed by them; 4.70% for the State on the salaries of the employees, the remuneration of the self-employed and officials and on pensions; 4.00% for self-employed on their remuneration; 2,.5% for pensioners on their pension; 2.65% for income earners on their income; 2.65% for Government officials on their remuneration; 2.90% for the persons responsible of remuneration to Government Officials on their remuneration. In addition to contributions, healthcare system is financed by co-payments and direct contributions (in the last case with regard to visits to outpatient specialists without a referral). (https://www.gesy.org.cy/sites/Sites?d=Desktop&locale=en_US&lookuphost=/en-us/&lookuppage=hiofinancing, last visit 10.06.2021).
[160] Percentage according to the General Healthcare System (Amending) Law of 2017 concerning the contribution of income earners to the General Healthcare System (GHS), which is as of 0.03.2020 2.65% on income such as rent, interests, dividends, etc. Please note that the GHS is not specific to the benefits falling under the scope of the coordination Regulation (https://www.gesy.org.cy/sites/Sites?d=Desktop&locale=en_US&lookuphost=/en-us/&lookuppage=hiofinancing, last visit 10.06.2021).
[161] The percentage concerns the financing of the General Healthcare System (GHS) under the General Healthcare System (Amending) Law of 2017 and it is not specific to the coordination Regulation benefits

Member State	Healthcare financing				
	contributions	Earmarked taxes	General tax	Percentage on income[151]	Percentage on pensions
CZ	80%		20%	13.50%	
DE	93.93%		6.07%	14.60%[162]	7.30%[163]
DK			100%	-	-
EE		83%	16%	33%[164]	-
EL	-	-	[60%][165]	7.10%	6%
ES			100%	-	-
FI	3.60%[166]		74.80%[167]	0.68%[168]	1.65%[169]
FR	34%	33%	25%[170]	7.3% (or 13.3% for higher wages) of healthcare contributions + 9.2% CSG tax (funding partly healthcare schemes) + 0.5% CRDS tax (funding the overall social security debt)	0% of healthcare contributions, but 9.1% of "taxes" which partly contribute to healthcare schemes budget [CSG + CRDS+ CASA]
HR	79.53%	8.01%[171]	12.39%	16.5%	1% or 3%[172]
HU[173]	45.%	35.1%	19.6%[174]	11.40%[175]	-
IE			100%[176]	-	-
IS			100%	-	-

(https://www.gesy.org.cy/sites/Sites?d=Desktop&locale=en_US&lookuphost=/en-us/&lookuppage=hiofinancing, last visit 10.06.2021).

[162] A contribution supplement between 0.20 and 2.70% can be added.

[163] The same percentage is paid by the State to health care institution. Supplements apply as for the active persons.

[164] Social Tax covering several risks.

[165] Various resources are used to finance social security in EL. There is no specific percentage. The State finances about 60% of the health care system (additional resources are the fines imposed in violation of labor legislation and 20% of the sale and utilization of public real estate).

[166] Percentage of the overall financing of healthcare (all financing schemes), including both public healthcare scheme and national health insurance scheme as well as voluntary schemes and household out-of-pocket payments (2018 statistics).

[167] Percentage of the overall financing of healthcare (all financing schemes), including both public healthcare scheme and national health insurance scheme as well as voluntary schemes and household out-of-pocket payments (2018 statistics). Covers sickness and long-term care.

[168] Contribution percentage for medical care coverage under the National Health Insurance scheme (in 2021).

[169] Contribution percentage for medical care coverage under the National Health Insurance scheme (in 2021).

[170] Tax on tobacco and VAT.

[171] Other sources including earmarked taxes.

[172] Depending on the amount of the pension.

[173] Based on Statistical Yearbook, 2019 of the National Institutte of Health Insurance Fund Management, Hungary. (Source: http://site.oep.hu/statisztika/2019/pdf/Evk19.pdf#pagemode=bookmarks&view=FitH&page=1) (13.06.2021)

[174] For those, covered by the tax-financed scheme.

[175] For those, not covered by the tax-financed scheme.

[176] Only 36% of the population are entitled to public health care.

Member State	Healthcare financing				
	contributions	Earmarked taxes	General tax	Percentage on income[151]	Percentage on pensions
IT	3%		97%[177]		
LI			Rest	Premiums[178]	Premiums[179]
LT[180]	68.75%		28.90%	6.98%	-[181]
LV			Rest[182]	1%	-
LU	60%		40%	5.6%	2.8%
MT		42%[183]	56%[184]	20%[185]	-
NL[186]	88% / 58%[187]		5.2 / 24%[188]	€ 1,473 and 7% / 9.65%[189]	€ 1,473 / 9.65%[190]
NO	100%			22.30%[191]	5.10%
PL	100%			9%	9%
PT	1.6%[192]		97%[193]	-	-
RO	37%		63%	10%	-
SE			100%	-	-
SI	83.8%		16,2%		
SK	78%		22%[194]	14%	-

[177] The Italian national health system is financed by a combination of national and regional taxes, plus other contributions.
- The VAT covers roughly 55% of the total.
- Regional taxes (IRAP and addizionale regionale IRPEF) cover roughly 25% of the total
- other taxes and individual contributions make up for the rest (roughly 20% of the total)

[178] No percentage of income.
[179] No percentage of pension.
[180] The main source of information about the financing of health care in Lithuania is the Law of the Republic of Lithuania on Approval of Budget Indicators of the Compulsory Health Insurance Fund for 2020. https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/5617f9d0232711eab86ff95170e24944
An analysis of the health insurance fund's budget expenditure does not make it possible to determine exactly what part of it goes to long-term care.
[181] Health care for pensioner is insured by the state.
[182] Part not covered by the newly introduced contributions.
[183] For all branches of social security.
[184] Including the fixed percentage of the contribution base which has to be paid by the state and the coverage of any deficit of the scheme.
[185] Overall social security contribution of 10% for employer and employee; no specific percentage is dedicated to health care.
[186] Data from 2020.
[187] Long term care.
[188] For sickness (curative health care) / long-term care.
[189] For sickness (curative health care) / long-term care. For sickness (curative health care) for active persons the employer pays a percentage while the insured person pays a premium.
[190] For sickness (curative health care) / long-term care. For sickness (curative health care) insured person pays a premium.
[191] For all branches of social security; although this is not stated in the law in reality 5.10% are dedicated to healthcare.
[192] NHS, representing 57% of all health expanses currently (source: Approximate data revealed by Health Minister at Parliament, July 2019).
[193] Source: Approximate data revealed by Health Minister at Parliament, July 2019.

Member State	**Healthcare financing**				
	contributions	**Earmarked taxes**	**General tax**	**Percentage on income**[151]	**Percentage on pensions**
UK	20%		80%	-	-

This section focuses on the issues that arise when Member States finance **healthcare for pensioners in different ways**. For instance, Member States 1 and 2 might seek to levy 10% on pensions to finance healthcare. A pensioner subject to the tax law and social security law of one of those Member States would see their € 2,000 pension reduced to € 1,800 net (Table J). In this section, the applicable social security law is understood as the law of the Member State that is allowed to deduct healthcare contributions from pensions (even though the law of another Member State might apply to other branches of social security).

Table J	**MS 1**	**MS 2**
Pension	€ 2,000	€ 2,000
Tax rate for pension	0%	10%
Tax on pension	€ 0	€ 200
Contribution rate for pension	10%	0%
Contribution on pension	€ 200	€ 0
Pension after tax and contribution	€ 1,800	€ 1,800

A pensioner subject to the tax law of Member State 1 and the social security law of Member State 2 would not contribute at all to the financing of healthcare for pensioners (Table K).

Table K	**MS 1**	**MS 2**
Pension	€ 2,000	
Tax rate for pension	0%	
Tax on pension	€ 0	
Contribution rate for pension		0%
Contribution on pension		€ 0

[194] Gainfully insured persons cover the major part of healthcare although they make up less than half of all policyholders (42.5%).

Pension after tax and contribution	€ 2,000	

A pensioner subject to the tax law of Member State 2 and the social security law of Member State 1 would contribute twice to the financing of healthcare for pensioners (Table L).[195]

Table L	**MS 1**	**MS 2**
Pension	€ 2,000	
Tax rate for pension		10%
Tax on pension		€ 200
Contribution rate for pension	10%	
Contribution on pension	€ 200	
Pension after tax and contribution	€ 1,600	

One way in which the above scenarios are simplified, is that they do not account for the fact that the healthcare of pensioners is not necessarily financed exclusively or mostly by pensioners. Some Member States finance it by **levying taxes and/or contributions during working years**, while others impose **taxes and/or contributions on pensions**. Again, there is a risk of distortions when a pensioner has links with Member States taking different approaches.

Imagine a person earned an average of € 3,000 per month during their career, after which they receive a pension of € 2,000 per month (Table M).[196] A person subject to the tax and social security law of Member State 1 would finance healthcare for pensioners during their career (10% of income taxes), but not after reaching pensionable age. A person subject to the tax and social security law of Member State 2 would finance healthcare for pensioners only through deductions on pensions, and not during their career. As a result, he or she would take home a higher salary (€ 2,100 rather than € 2,000), but a lower pension (€ 1,800 rather than € 2,000), than a person subject to tax and social security law of Member State 1.

Table M	**MS 1**	**MS 2**
Income tax rate	33%	30%
Income tax	€ 1,000	€ 900
Percentage of income taxes funding healthcare for pensioners	10%	0%
Income tax funding	€ 100	€ 0

[195] For an example in which a person contributes to the financing of healthcare for pensioners in three Member States, see *A. P. van der Mei, G. Essers and C. Douven*, "Pensioners and the financing of cross-border health care: bottlenecks in the fields of European social security law and international tax law", European Journal of Social Law (2011) 92, 104.

[196] To simplify matters, we disregard social security contributions on wages and taxes on pensions.

healthcare for pensioners		
Income tax not funding healthcare for pensioners	€ 900	€ 900
Salary after tax	€ 2,000	€ 2,100
Contribution rate for pension (funding healthcare for pensioners)	0%	10%
Contribution on pension (funding healthcare for pensioners)	€ 0	€ 200
Pension after contribution	€ 2,000	€ 1,800
Total sum funding healthcare for pensioners	€ 100 per month during career € 0 per month during pension	€ 0 per month during career € 200 per month during pension

Problems arise where a person spends his or her career subject to the tax law of Member State 1, and becomes subject to the social security law of Member State 2 upon retiring (Table N). During their entire career, he or she would have funded healthcare for pensioners in Member State 1 at a rate of € 100 per month. When retiring, he or she would still be required to fund healthcare for pensioners, through a pension deduction of € 200 per month. As a result, this person would contribute twice. The advantage reaped by Member State 1 is undue, as it bears no responsibility for the costs of this pensioner's healthcare. Of course, there would not be that many cases in which a person has only worked in one Member States which afterwards grants also a pension due to that work and is subject to the healthcare contributions in another Member State of residence.[197] But the same effect would be visible when in addition to that pension from the Member State, in which the major part of the activity has been exercised, a small pension is also granted from the Member State of residence (because of a short activity also in that Member State).

Table N	**MS 1**	**MS 2**
Income tax rate	33%	
Income tax	€ 1,000	
Percentage of income taxes funding healthcare for pensioners	10%	
Income tax funding healthcare for pensioners	€ 100	

[197] Under Article 24 of Regulation (EC) No 883/2004 only the pension-paying Member State would remain competent to deduct the healthcare contributions and not the Member State of residence. But, it could be a case, when this pensioner receives in addition to that pension a survivor's pension from the Member State of residence which would make that Member State competent to levy healthcare contributions also from the pension which is paid due to the activity in the other Member State (this is a case under Article 23 of Regulation (EC) No 883/2004).

Income tax not funding healthcare for pensioners	€ 900	
Salary after tax	€ 2,000	
Contribution rate for pension (funding healthcare for pensioners)		10%
Contribution on pension (funding healthcare for pensioners)		€ 200
Pension after contribution		€ 1,800
Total sum funding healthcare for pensioners	€ 100 per month during career € 200 per month during pension	

The opposite scenario arises if a person was subject to the tax law of Member State 2 during their career and became subject to the social security law of Member State 1 upon retiring (Table O). At no point does he or she contribute to funding the healthcare of pensioners.

Table O	**MS 1**	**MS 2**
Income tax rate		30%
Income tax		€ 900
Percentage of income taxes funding healthcare for pensioners		0%
Income tax funding healthcare for pensioners		€ 0
Income tax not funding healthcare for pensioners		€ 900
Salary after tax		€ 2,100
Contribution rate for pension (funding healthcare for pensioners)	0%	
Contribution on pension (funding healthcare for pensioners)	€ 0	
Pension after contribution	€ 2,000	
Total sum funding healthcare for pensioners	€ 0 per month during career € 0 per month during pension	

The solutions to such excessive and insufficient contributions are variants on the solutions examined above (see Chapters 5.1.2.or 5.2. of this Report).[198] Given the financial stakes for pensioners and healthcare systems, they are well worth exploring further. Two real-life examples are worth reporting.

The Dutch Supreme Court (Hoge Raad) ruled on the case of a pensioner, **resident in the Netherlands, who received a public pension from Australia**. According to the applicable DTC this pension was taxable in Australia, where a substantial part of social security is financed through taxes. In the Netherlands this pension was subject to Dutch social security contributions. The question was whether this pension was correctly taken into account in the Netherlands for the social security contributions. The Supreme Court answered the question positively and used a formal criterion to define social security contributions.[199] The main consideration of the Supreme Court is that there is no reason to suppose that the Dutch legislator when using the term 'social security contribution' also took into account the levying of taxes in a tax system of another State that also serves to finance social security. It raises the following question: is it possible to counter the double burden? Should a formal criterion or a substance over form criterion be used for certain parts of taxes?

Some national **administrations** seem willing to solve such issues on a case-by-case basis. In the past for example, the Danish Ministry of Health and Prevention recommended that Dutch nationals living in Denmark who received a pension from the Netherlands without also receiving a Danish pension should contact the Danish tax authorities with the aim of requesting a tax credit. At the time, the Danish Ministry decided this following the introduction of the Health Insurance Act in 2006. The amount that should be eligible for this settlement is equal to the amount that would be owed in the Netherlands for compulsory health insurance. In other words, a **substance over form contribution concept** is applied here. It is not clear whether this solution is still being applied, but it offers a potential avenue for solving some of the above issues.

5.5 Highly mobile workers

5.5.1 Social security coordination

Highly mobile workers are a heterogenous group, ranging from seasonal workers to pan-European management personnel and posted workers in the construction industry. For the purposes of social security law, they are all subject to one of three conflict rules.

Firstly, highly mobile workers could be **posted** under Article 12 of Regulation (EC) No 883/2004, and therefore remain subject to the social security legislation of their State of origin while working in the State of destination. For employees, the main conditions are that they are posted by an employer normally carrying out its activities in the State of origin to carry out work in the State of destination for up to two years, without replacing

[198] For further analysis, see *A. P. van der Mei, G. Essers and C. Douven*, "Pensioners and the financing of cross-border health care", European Journal of Social Law (2011) 92, 107-109. One CJEU judgment might also be worth mentioning. Article 33 of Regulation (EC) No 1408/71 precluded a Member State that does not bear the cost of a pensioner's healthcare from making deductions for sickness and maternity insurance from his or her pension. In *Rundgren*, the CJEU read that provision as an emanation of "*the general principle resulting from Regulation No 1408/71 […], according to which a person entitled to a pension cannot, by reason of his residence in the territory of a Member State, be called upon to pay compulsory insurance contributions to cover benefits for which an institution of another Member State has assumed responsibility*" (CJEU case C-389/99, *Rundgren*, EU:C:2001:264, paragraph 57). As Sweden paid benefits similar to the Finish old-age and invalidity pensions, Finland could not levy contributions for old-age or invalidity from a pensioner residing on its territory who only received a Swedish pension. Could this "general principle" be stretched even further so as to preclude a Member State from levying taxes destined to finance pensioners' healthcare where it does not bear those costs? It seems more likely that the CJEU would analyse this question under the free movement rights of the TFEU.

[199] HR 22.04.2016, No 15/03689, NTFR 2016/1315.

another posted person. For self-employed persons, the main conditions are that they are normally active in the Member State of origin and that those activities are similar to the activities in the State of destination, which should last no longer than two years.[200]

Secondly, highly mobile workers could be considering to normally pursuing their activities in two or more Member States under Article 13 of Regulation (EC) No 883/2004. That provision sets out a set of rules (hereinafter '**the multi-activity rules**'). The legislation that is designated as applicable depends on whether the person is employed, self-employed, or a civil servant;[201] where he/she pursues a substantial part of his/her activity; where he/she resides; if self-employed, where the centre of interest of his/her activities is situated; if employed, where the employer's registered office or place of business is situated.[202]

If a person working as a director is performing activities in two or more Member States the allocation of the social security scheme depends on the nature of the activities performed. According to the *De Jaeck* case[203] the State in which the activities are performed classifies these activities which can result in Article 13 (1), (2) or (3) of Regulation (EC) No 883/2004 being applicable.

Thirdly, highly mobile workers could meet the conditions of neither Article 12 nor Article 13 of Regulation (EC) No 883/2004. By virtue of Article 11 (3) (a) of Regulation (EC) No 883/2004, they are then subject to the social security legislation of the Member State in which they pursue their activity (hereinafter '***the lex loci laboris***'). Consequently, that means that whenever they relocate their place of work, the applicable social security legislation shifts.

5.5.2 Tax coordination

The allocation of taxing rights for highly mobile workers also depends on their situation. Broadly speaking, different rules apply to posting and multi-activities.

Applicable taxation rules for **posting** are the following: In the case of a cross-border person performing activities as an employee, Article 15 of the OECD MC is applicable. According to Article 15 (2) of the OECD MC, remuneration derived in respect of employment in another Member State shall be taxable only in the Member State of residence if the following cumulative conditions are fulfilled (see also Chapter 3.3. of this Report):

a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and

b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and

[200] In practice, in 2018 the average duration was some 91 days per PD A1 or some 165 days per individual person. *Frederic De Wispelaere, Lynn De Smedt & Jozef Pacolet*, Posting of workers, Report on A1 Portable Documents issued in 2018, October 2019, p. 31.

[201] When a civil servant is performing activities in two or more Member States just for only one administration, he or she will be subject to the social security legislation of the Member State, to which the administration employing him/her is subject (Article 11 (3) (b) of Regulation (EC) No 883/2004).

[202] No maximum period is set by Article 13 of Regulation (EC) No 883/2004, but see Case C-879/19, *Format v Zakład Ubezpieczeń Społecznych I Oddział w Warszawie (hereinafter "Format II")*, EU:C:2021:409. In 2018 the average duration of persons covered by Article 13 is almost 300 days per PD A1. *Frederic De Wispelaere, Lynn De Smedt & Jozef Pacolet,* Posting of workers, Report on A1 Portable Documents issued in 2018, October 2019, p. 42.

203 CJEU case C-340/94, De Jaeck, EU:C:1997:43.

c) the remuneration is not borne by a permanent establishment which the employer has in the other State.[204]

The so-called tax posting rule is mainly laid down in the first condition of Article 15 (2) of the OECD MC, provided that two other conditions of this provision are also fulfilled. The first condition is that the physical presence of the employee should not exceed an aggregate of 183 days in the State of work. Physical presence is one of the criteria necessary for the allocation of the right to taxation to the source State. According to paragraph 5 of the Commentary to Article 15 of the OECD MC the following days are included in the calculation of the days: "*(…) part of a day, day of arrival, day of departure and all other days spent inside the State of activity, short breaks (training, strikes, lock-out, delays in supplies), days of sickness (unless they prevent the individual from leaving and he would have otherwise qualified for the exemption) and death or sickness in the family. However, days spent in the State of activity in transit in the course of a trip between two points outside the State of activity should be excluded from the computation. It follows from these principles that any entire day spent outside the State of activity, whether for holidays, business trips, or any other reason, should not be taken into account. A day during any part of which, however brief, the taxpayer is present in a State counts as a day of presence in that State for purposes of computing the 183 day period*." States can deviate from this calculation.

The second condition concerns the remuneration paid to the employee and here there are two possibilities: the remuneration is *paid by* (formal test), or *on behalf of* (economic test) an employer who is not a resident of the other State. This is the conundrum of the formal versus economic employer (also called the **substance over form-approach**).

In paragraph 8.13[205] of the Commentary to Article 15 of the OECD MC, the following is stated about the employment relationship: "*The nature of the services rendered by the individual will be an important factor since it is logical to assume that an employee provides services which are an integral part of the business activities carried on by his employer. It will therefore be important to determine whether the services rendered by the individual constitute an integral part of the business of the enterprise to which these services are provided*." In sum, it is about the integration and control criteria. If these criteria are fulfilled then the State of work may tax the income. Paragraph 8.14 of the Commentary to Article 15 of the OECD MC provides some additional factors to determine whether the employment relationship is different from the formal contractual relationship. Examples of such factors are:

(i) who has the authority to instruct the individual regarding the manner in which the work has to be performed, who controls and has responsibility for the place at which the work is performed,

(ii) whether the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided, and

(iii) who puts the tools and materials necessary for the work at the individual's disposal.

A growing number of countries follow the substance over form approach or the economic employer concept under certain conditions. However, these conditions can differ. For example, **Belgium, Germany**, **the Netherlands**[206] and **Sweden**[207] as of 2021 are

[204] Articles of the Model Convention as they read on 21.11.2017.
[205] Introduced in 2010 in the OECD Commentary.
[206] Order of 12.01.2010, No DGB2010/267M, Government Gazette 2010, 788.
[207] Hired staff are to pay tax in Sweden - Riksdagen, https://www.riksdagen.se/en/news/2020/nov/4/hired-staff-are-to-pay-tax-in-Sweden/.
In case of hiring out of labour the Swedish court has followed an economic employer concept in its case law in relation to social security contributions. SE; HFD, 20.06.2020, RÅ 2001, ref. 50. *Katia Cejie*, "Taxes and

following the substance over form approach. This can be illustrated by the following example: **The Netherlands** follows the substance over form approach in case of short term employment, regardless whether it is group company secondment or hiring out of labour. According to the Dutch legislation a person or company can be regarded as the employer of an employee carrying out temporary cross-border tasks provided that:

a. the person or company exercises authority over the employee in relation to those tasks, i.e. the person or company authorised to instruct the employee; and

b. the person or company pays the earned income of the employee for those tasks and bears the benefits, losses and risks of those tasks.

The employer is considered to be the person who or company which has the right to instruct the employee with regard to the work to be performed (material interpretation of employer), rather than the person or company with whom or which the employee has concluded a civil law employment contract (formal interpretation of employer). Another requirement is that the employee performs the relevant cross-border tasks at the expense and risk of that person or company. This implies that that person or company who is the employer defrays the costs of the employment - the salary paid to the employee for the relevant cross-border tasks and the accompanying benefits, losses and risks. That person also bears those costs, if they are charged to him on an individualised basis by another person or company (the formal employer), who pays remuneration in respect of the cross-border activity. The calculated wage costs for the employee per time unit, e.g. a day, are sufficient for that purpose.[208]

It should be noted that for practical reasons the Netherlands does not follow the substance over form approach in case of an intra-group secondment of less than 60 days over a 12-month period. Some other countries have similar arrangements in the case of short term intra-group secondments. Moreover, the definition of an employer is not the only issue with respect to the application of Article 15 of the OECD MC. Other examples of terms which are not defined are "salaries, wages and other similar remuneration derived in respect of an employment", and "such remuneration as is derived therefrom".[209]

The outcome of following the substance over form approach is that despite the fact that the employee is physically present in the State of work for less than 183 days a year, there will be an employer in the working State for DTC purposes. Also note that in Article 15 (2) (b) of the OECD MC the term '***an employer'*** is used.[210] The presence of 'an employer' is required for the allocation of taxing rights. If there is an employer in the State of work the second condition of Article 15 (2) of the OECD MC is not fulfilled and the right to impose tax is allocated to the State of work, despite the fact that the employee is physical present in the state of work for less than 183 days in a year.

In the case of a person is working in two or more Member States, in other words performing **multi-activities**, the allocation of taxation responsibility of each of these activities has to be checked against the applicable DTCs. For example, employee X is

Contributions on Cross-Border Employment Income – before and During the COVID-19 Pandemic", Bulletin for International Taxation, 2020 (Volume 74), No 12, paragraph 2.2.4.

[208] Order of 12.01.2010, No DGB2010/267M, Government Gazette 2010, 788, paragraph 4.

[209] *B. Peeters*, 'Article 15 of the OECD Model Convention on "Income from Employment" and its Undefined Terms, European Taxation 2004 (Vol. 44), No 2/3, p. 72-82.

[210] Different wording is used in Article 15 (2) (b) and Article 15 (2) (c) of the OECD MC. 'An' employer is used in Article 15 (2) (b) of the OECD MC, while in Article 15 (2) (c) of the OECD MC the term 'the' employer is used. It could be argued that the differences serves the different purposes of (b) and (c). A PE mentioned in Article 15 (2) (c) of the OECD MC is not a legal entity and, therefore, as such, cannot act as a separate employer in the work State. *L. de Broe et al*., Interpretation of Article 15 (2) (b) of the OECD Model Convention: *"Remuneration paid by, or on behalf of, an employer who is not a resident of the other State"*, Bulletin for international fiscal documentation, IBFD Publications, Amsterdam, Nederland, Vol. 54 (2000), No. 10, p. 512.

living in State A, and is performing activities in State B and State C. State A has concluded a DTC with State B and with State C. For the activities performed in State B, the applicable DTC is the A-B DTC and for the activities performed in State C, the applicable DTC is the A-C DTC. In both cases the right to levy the taxes is set according to provisions modelled on Article 15 (1) and (2) of the OECD MC. If in both cases the conditions of Article 15 (2) OECD MC are not met, because e.g. the employer is established in the State of work, the State of work has the right to tax the income. In other words, a **salary split** will be the result of the application of the DTCs. The State of residence has to grant tax relief, whether as an exemption or credit, according to Article 23 A or Article 23 B of the OECD MC. In most cases the progressive method of exemption will be used under Article 15 of the OECD MC, but the relevant DTC must also be considered.

Where a person is performing activities **as a director,** Article 16 OECD MC will be applicable and the taxing right is allocated to the source State. According to Article 16 of the OECD MC, directors' fees and other similar payments derived by a resident of a Contracting State in his or her capacity as a member of the board of directors of a company which is resident of the other Contracting State may be taxed in the other State. In most cases, the credit method is used for the relief of double taxation. In practice the interpretation of this provision can lead to different outcomes. Issues remain as to who is within the scope of the Article and what kind of income is to be taxed according to Article 16 of the OECD MC. One issue for instance is whether executive directors are included in the scope of Article 16 of the OECD MC or not, which links then to the days of physical presence in the working State. Some countries state that in these cases, Article 16 of the OECD MC is applicable, and not Article 15 of the OECD MC. This can result in double taxation or non-taxation.[211]

5.5.3 Interface between social security and tax

At a general level, social security coordination and tax coordination **share common goals**. They aim to allocate the power to levy social security contributions and taxes between the various States with which highly mobile workers have some connections, with an emphasis on the State of (habitual/current/temporary) work and the State of residence. Up to a point, both social security coordination and tax coordination seek to stabilise the applicable legislation, so that each crossing of the border does not entail a shift in the applicable legislation. The means by which social security coordination and tax coordination seek to attain those objectives – the conflict rules – are however often different.

In some situations, the social and fiscal conflict rules point to **the same Member State**. That is for instance the case where an employer established and normally carrying out its activities in the Member State of origin posts a worker who is a fiscal resident of the Member State of origin, for less than 183 days per fiscal year, while complying with the non-replacement rule and fulfilling the conditions laid down in Article 15 (2) of the OECD MC. Such a worker is subject to the social security and tax law of the Member State of origin.

In other situations, however, the **social and fiscal conflict rules point to different Member States**. This could lead to the issues analysed in Chapters 5.1, 5.2 and 5.3 of this Report.

One example is the **duration of the posting** in the case of short-term employment: 183 days per year in tax law and two years in social security law. The result of these rules is that presence of more than 183 days in any one year will result in a mismatch with the

[211] *R. Prokisch*, "International taxation of Director's Fees (Article 16 of the OECD Model)", published in: *Lang/Pistone/Schuch/Staringer* (eds.), Source versus Residence: Problems arising from the allocation of Taxing *Rights in Tax Treaty Law and Possible Alternatives, Eucotax Series on European Taxation (Vol. 20), Kluwer Law International, 2008, p. 197- 213.*

social security rules on posting. After 183 days of residence, remuneration will be taxed in the State of work. In case the second condition of Article 15 (2) of the OECD MC is not fulfilled, the State of work has the right to levy taxes as of day 1 of the performance of activities by the employee. A mismatch between taxation and social security contributions will also arise. The different coordination rules of a DTC and Regulation (EC) No 883/2004 result in different outcomes. A salary-split (taxed in two States) can be the result from the point of view of taxation while for social security there is the exclusive competence of one State as provided for under Regulation (EC) No 883/2004. Differences emerge, not only when taking a snapshot as above, but also in the **transition** from one conflict rule to the next. Accordingly, for the first 183 days of presence of the posting term, an employee will be subject to the tax and social security law of the State of origin. For the following 18 months, he or she will be subject to the tax law of the State of temporary work and the social security law of the State of origin. Finally, after two years, he or she will be subject to the fiscal and social security law of the State of origin.[212]

Timeline	MS competent to levy social security contributions	MS competent to levy income taxes	Total burden
Day 1 – 183	MS 1 (rate of 10%)	MS 1 (rate of 30%)	40%
Day 183 – 2 years	MS 1 (rate of 10%)	MS 2 (rate of 25%)	35%
2 years – …	MS 2 (rate of 15%)	MS 2 (rate of 25%)	40%

Another difference is that **self-employed persons** can be posted for social security purposes, but not for fiscal purposes. In case of a self-employed person, Article 7 of the OECD MC is applicable. In general, the taxing right is allocated to the residence State, unless a business is carried on in the other State through a **permanent establishment** (hereinafter PE).

Another example of differences between States lies in the **definition of employer**. As described above, States can follow the substance over form approach for short term employment. The result is that in case of posting the right to levy taxes can be allocated to the State of work and the right to levy the social security contributions is allocated to the sending State. Again, a mismatch between taxation and social security contributions occurs.

As already explained in Chapter 3.4 of this report, the difference between tax and **socially earmarked tax** is that the latter has as its purpose the financing of the social security system.[213] This factor, if it were clarified somewhere, should make the levies easier to understand and mismatches easier to identify.[214]

A last but small example of mismatch lies in the application of Article 20 of the Durch-Belgian DTC, the so-called **'professor' provision**. According to this Article the right to levy taxes of income received by a person who performs a cross-border activity as a professor or another teaching or research function is allocated to the State of residence

[212] It is assumed that Article 11 (3) (a) of Regulation (EC) No 883/2004 applies.
[213] *K. Cejie*, "Taxes and Contributions on Cross-Border Employment Income – before and During the COVID-19 Pandemic", Bulletin for International Taxation, 2020 (Volume 74), No 12, paragraph 6.2.
[214] *K. Cejie*, "Taxes and Contributions on Cross-Border Employment Income – before and During the COVID-19 Pandemic", Bulletin for International Taxation, 2020 (Volume 74), No 12, paragraph 6.2.

for the first two years.[215] If they only work in one State, the social security contributions are due in the State of work according to Article 11 (3) (a) of Regulation (EC) No 883/2004 from the start of the activities in the other State.

Those issues are compounded by **legal uncertainty** for all workers (and in particular highly mobile workers), for their employers, and for social security and fiscal institutions.

The boundary between the three *social* conflict rules can be uncertain. For instance, where there is only one employer, it can be difficult to draw the line between the multi-activity rules (for people who normally, rather than merely occasionally, pursue an activity in more than one Member State) and the posting rule (for people who temporarily work abroad). A person normally works in more than one Member State where he or she 'habitually carries out significant activities in the territory of two or more Member States'.[216] This is to be determined having regard to a multitude of factors.[217] As a result, it can be hard to determine whether a person habitually performs significant activities.

Not only the scope of the social conflict rules, but also their connecting factors, can be vague. For instance, employees who pursue a substantial part of their activity in their Member State of residence are subject to its legislation.[218] While Article 14 (8) of Regulation (EC) No 987/2009 and the Practical Guide flesh out the meaning of a 'substantial part' of the activity, it can remain difficult to ascertain and predict.[219] When applying the notion of substantial part, institutions "*shall take into account the situation projected for the following twelve calendar months*."[220] Employees who do not pursue a substantial part of their activity in their Member State of residence are subject to the legislation of the Member State in which their employer's registered office or place of business is located.[221] While in *AFMB* the Grand Chamber of the CJEU defined the "employer" as "the undertaking which has actual authority over [the worker], which bears, in reality, the costs of paying his or her wages, and which has the actual power to dismiss him or her", regardless of the employment contract, borderline cases remain in e.g. international groups.[222]

The ***fiscal* conflict rules** also raise interpretation issues. For instance, the concept of the employer can be disputed.[223] As stated above, provided that a State is following the substance over form approach in case of short term employment, the State of work can tax the income. Compared to social security the substance over form approach is followed much longer for tax purposes. The approach was introduced in the Commentary to Article 15 of the OECD MC in 2010. The recent A*FMB* case[224] seems to indicate that the substance over form approach can be followed under certain conditions and circumstances in social security law as well. This is an interesting development which can improve the parallelism between (some) DTCs and Regulation (EC) No 883/2004. Nevertheless, uncertainty concerning the concepts uses under Regulation (EC) No 883/2004 and DTCs remains and it cannot be said that the same expressions used (as e.g. "employer") mean the same in both fields of law. Additional research and, unless there are good reasons for keeping them distinct, **efforts to harmonize the meaning of these notions** would be highly recommendable.

Highly mobile workers, their employers, and social and fiscal institutions might therefore experience the compounded uncertainty from both bodies of law.

[215] In the current negotiations of a new the Dutch-Belgian DTC, the Netherlands want to discuss this provision.
[216] CJEU Case C-610/18, *AFMB v Raad van bestuur van de Sociale verzekeringsbank*, EU:C:2020:565, para 46.
[217] These are listed e.g. in Case C-879/19, *Format v Zakład Ubezpieczeń Społecznych I Oddział w Warszawie (hereinafter "Format II")*, EU:C:2021:409, para 22.
[218] Article 13 (1) (a) of Regulation (EC) No 883/2004.
[219] Practical guide: The legislation that applies to workers in the European Union (EU), the European Economic Area (EEA) and in Switzerland (December 2013), Part II/3.
[220] Article 14 (10) of Regulation (EC) No 987/2009.
[221] Article 13 (1) (b) of Regulation (EC) No 883/2004.
[222] CJEU Case C-610/18, *AFMB*, paragraph 80.
[223] FreSsco Report 2014, p. 25-26.
[224] CJEU Case C-610/18, *AFMB v Raad van bestuur van de Sociale verzekeringsbank*, EU:C:2020:565.

5.6 Consequences of the Covid-19 Pandemic

5.6.1 Social security coordination

The Covid-19 pandemic threw the boundary between the *lex loci laboris* and the multi-activity rules into sharp relief. The phenomenon of telework – the regular performance of work off-site facilitated by information technology – has expanded significantly due to the (practical and/or legal) inability of cross border workers to commute to their place of work. Among the issues that have increased in practical importance are the location of work and the threshold of substantial activities.

5.6.1.1 What is telework?

It seems that there is no clear definition for telework or work from home. For the purpose of this Report,[225] "telework" has to be understood as a broad concept of work performed not on the premises of the employer, covering both working from home and "mobile working".[226] While working from home has to be understood as working from the dwelling of the employee, it is not necessarily confined to working online but including physical work normally performed on the employer's premises (e.g. employees who work usually in a factory producing shirts who are sent by their employer to sew at home on their sewing machines during the pandemic). Mobile working usually does not depend on the place where the work is carried out (it could be done electronically from anywhere in the world, in a coffee-shop, train, airport etc.). During the pandemic this broad concept of telework gained prominence as it assumed a greater than usual role in the labour market.

5.6.1.2 The location of (tele)work

What is the social security position of persons who, before the pandemic, worked only in a Member State other than the one in which they resided, and since the pandemic work (at least partially) from somewhere else – predominantly from home (hereinafter 'teleworkers')? Essentially, there are three scenarios to be considered:

(i) persons who work only in their Member State of residence,

(ii) persons who work only in their Member State of usual (i.e. pre-Covid) work (hereinafter 'Member State of usual work'), or

(iii) persons who work normally in both Member States.

Much depends on how work is defined and where it is located. This section begins by analysing Regulation (EC) No 883/2004 and then considers the Covid-related measures that Member States have put in place.

First, **what is work?**

Regulation (EC) No 883/2004 defines an "activity as an employed person" and an "activity as a self-employed person" as "*any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists*".[227]

Second, **where** does work take place?

[225] Admittedly this is not the only way to define telework: In the Council conclusions on telework of 14.06.2021, telework is understood only as "work using ICT performed outside the employer's premises" based on a previous definition of the ILO (2020), COVID-19: Guidance for labour statistics data collection: Defining and measuring remote work, telework, work at home and home-based work, ILO technical note (p.6).

[226] See e.g. the explanations on the homepage of the AT Labour Inspectorate: https://www.arbeitsinspektion.gv.at/homeoffice#heading_Was_ist_Telearbeit._

[227] Article 1(a)-(b) of Regulation (EC) No 883/2004. See further e.g. Case C-137/11, *Partena v Les Tartes de Chaumont-Gistoux*, EU:C:2012:593, §50 and case-law cited.

In *Partena* the CJEU defined the "location" of work as "***the place where, in practical terms, the person concerned carries out the actions connected with [the] activity***."[228] According to that ruling the work performed in the State of residence is located there. As a result, a teleworker is considered to be active in his or her Member State of residence if he or she works from home. In practical terms, of the three scenarios outlined above, only two remain possible. Under Regulation (EC) No 883/2004, a person who started to work from home as a teleworker cannot be considered to only work in his or her Member State of usual work befor that change; therefore, he or she can be considered either to work only in his or her Member State of residence, or to work in both Member States. As we will see, this has important consequences for the legislation applicable to a teleworker.

5.6.1.3 The legislation applicable to teleworkers under Regulation (EC) No 883/2004

This section determines which law applies to teleworkers under Regulation (EC) No 883/2004 for the period(s) of the pandemic when work at the workplace is/was actively discouraged and/or prohibited by Member States. We will see below that Member States have put in place specific measures to prevent such teleworkers from becoming subject to a different social security systems. However, under the Regulation, the legislation applicable to a teleworker is determined as follows.

If the worker only teleworks, then he or she falls under the *lex loci laboris* and the applicable law is no longer that of the Member State of the usual workplace before, but that of the Member State of residence, in which the whole activity takes place. There is therefore a shift in social security law applicable to such a person.

If the worker does not only telework, but also works in the Member State of usual work, then this could give rise to further questions to determine whether the *lex loci laboris* or the multi-activity rules apply. Does the activity in the Member State of usual work still qualify as an 'activity as an employed or self-employed person'? If so, is it more than marginal? If the answer to either of those questions is negative, the teleworker is considered to only work in the Member State of residence and therefore subject to its legislation by virtue of the *lex loci laboris*.

Marginal activities are to be disregarded for the purposes of Article 13 of Regulation (EC) No 883/2004.[229] If a teleworker only returns to the Member State of usual (ie pre-Covid) work for the occasional meeting, those activities might be seen as marginal, meaning that he or she is deemed to only work in the Member State of residence and therefore subject to its legislation.

A further question is whether the activities are **normally** pursued in both Member States. For the multi-activity rules of Article 13 of Regulation (EC) No 883/2004 to apply, the person must habitually carry out significant activities in the territory of more than one Member State. Otherwise the person falls under the *lex loci laboris* or the posting rule.

Therefore, a Covid-teleworker is subject to the multi-activity rules if his or her activities are:

(i) activities as an employed or self-employed person,

(ii) not marginal, and

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[228] CJEU Case C-137/11, *Partena*, para 57. See also (by implication) Practical guide: The legislation that applies to workers in the European Union (EU), the European Economic Area (EEA) and in Switzerland (December 2013), 21-22; For the sake of the equal treatment of the teleworker on the work floor and the avoidance of social dumping, *Y. Jorens* et al. propose to consider that he or she performs his or her entire activity at the establishment of the employer (*Jorens, Lhernould, Fillon, Roberts and Spiegel*, "Towards a new framework for applicable legislation: New forms of mobility, coordination principles and rules of conflict", (trESS Think Tank Report 2008), <http://www.tress-network.org/tress2012/EUROPEAN%20RESOURCES/EUROPEANREPORT/ThinkTank_Mobility.pdf>, 5).

[229] Article 14 (5b) of Regulation (EC) No 987/2009.

(iii) normally pursued in both States.

What legislation do the multi-activity rules designate as applicable? The -teleworker will become subject to the legislation of the Member State of residence if he or she pursues a substantial part of his or her activity there.[230] This may well be the case for teleworkers during the pandemic, whose work in many cases exceeds the indicative 25% threshold. Another tricky issue might be the duration for which this assumption can be made. For the application of Article 13 of Regulation (EC) No 883/2004 the probable situation during the next 12 months is relevant,[231] which might be difficult to predict *ex ante* as measures during the pandemic were initially to be temporary but have been prolonged gradually to take into account the evolution of the pandemic. From an *ex post* perspective some of these work patterns continued for more than 12 months because of the pandemic.

The applicable legislation to teleworkers who do not pursue a substantial part of their activity in their State of residence depends on their status. An employee would be subject to the legislation of the Member State in which the employer's registered office or place of business is located. This is quite likely to be the Member State of usual work, in which case the applicable law does not change when telework starts or increases. A self-employed person would be subject to the legislation of the Member State in which the centre of interest of his or her activities is found.

In sum, under Regulation (EC) No 883/2004, a non-resident worker who, because of the Covid-19 pandemic, started to work at home, may become subject to a different social security system. Because such a teleworker's activity in the Member State of residence is typically a non-marginal 'activity as an employed or self-employed person', he or she cannot be considered to work only in the Member State of usual work. Such a teleworker might only work in the Member State of residence, and therefore would become subject to its legislation rather than that of the Member State of usual work. Alternatively, a teleworker might fall under the multi-activity rules, which designate different Member States depending on the circumstances. Often (though not always), the shift from non-resident work to telework such as that seen during the pandemic results in a shift in the applicable legislation from the Member State of usual work to the Member State of residence. This shift may even be followed by a second shift, once the worker terminates or reduces his or her work from home.

A shift from the social security legislation of the Member State of usual work to the legislation of the Member State of residence (and possibly back) may well be **undesirable** from an administrative perspective for both employers and social security authorities. Also, maintaining the legislation that applied to workers pre-Covid may well be in the interests of workers, employers, and social security authorities. It can be assumed that, especially when telework is intended only as a temporary measure to cope with the restrictions as a consequence of the pandemic, many workers and their employers would prefer to maintain the status quo.

5.6.1.4 The legislation applicable to teleworkers under unilateral or bilateral measures

In order to avoid such a shift in the applicable social security legislation for teleworkers during the pandemic, some Member States have **unilaterally** decided to ignore homeworking due to the pandemic.[232] This guarantees that teleworkers remain subject to the same social security legislation that applied before the Covid-19 pandemic. While the

[230] Article 13 (1) (a) and (2) (a) of Regulation (EC) No 883/2004. For persons who normally exercise activities as an employed person and as a self-employed person in different Member States, see Article 13 (3) of Regulation (EC) No 883/2004.
[231] Article 14 (10) of Regulation (EC) No 987/2009.
[232] As can also be seen from the replies by the MoveS national experts to questions 3 and 4 (see Chapter 4 and the Annex of this Report).

end of continuity is not particularly questionable, the means are. In principle, the social security regulations are binding in their entirety, and they do not contain a *force majeure* clause. While some concepts of the Regulations are vague, and could be interpreted in such a way as to maintain the applicability of the *lex loci laboris*, the room for interpretation is limited.

Bilateral or multilateral solutions could offer more legal certainty. The Commission recommended that Member States use Article 16 of Regulation of (EC) No 883/2004 'with a view to maintaining the social security coverage unchanged for the worker concerned.'[233] A number of Member States have concluded so-called 'Article 16 agreements' on this basis.

Article 16 of Regulation (EC) No 883/2004 empowers the competent authorities of two or more Member States to agree to derogate from the conflict rules laid down in Title II "*in the interest of certain persons or categories of persons*", with retroactive effect where desired.[234] As indicated above, the CJEU held in the *Brusse* case that "*the Member States enjoy a wide discretion to which the only limitation is regard for the interests of the worker.*"[235] In that case, the Commission submitted that '[*t*]*he interest must be in the determination of the legislation applicable, and not in its application*.'[236] Accordingly, the level of protection afforded and contributions due in either Member State would be irrelevant—a point of view that finds support in the literature.[237]

Article 16 agreements for teleworkers due to the pandemic seem legally possible. It seems that maintaining the legislation that applied pre-Covid is in the interests of the typical Covid-teleworker, especially if the level of benefits and contributions is disregarded. Admittedly, it is likely that some teleworkers will continue to telework after the pandemic. At that point, a reassessment of their situation will be necessary, which may well entail a shift in the applicable legislation. But that shift will be the consequence of a durable shift in work pattern, rather than being compelled by short-term government or company responses to Covid-19. Article 16 agreements should not be used to *indefinitely* exclude wide large groups of workers from the conflict rules of Regulation (EC) No 883/2004. However, as long as the pandemic requires teleworking, it is arguable that it is in the interest of teleworkers for the applicable legislation to be maintained. Article 16 agreements to that effect are therefore likely to fall within the wide discretion which Member States enjoy in these matters. It is worth noting that Article 16 agreements do not have to be limited to two Member States.

5.6.2 Tax coordination

Due to the Covid-19 pandemic many employees and self-employed persons were obliged to work in their State of residence. A cross-border worker working in this State of residence would according to Article 15 of the OECD MC be taxable by that State of residence for in respect of the days he worked in that State. In other words, there would be a shift of allocation of the taxation rights from the source State to the residence State.

[233] Communication from the Commission, Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (2020/C 102 I/03), para 8.

[234] CJEU Case 101/83, *Raad van Arbeid v Brusse*, EU:C:1984:187, paragraphs 19-23; Case C-454/93, *Rijksdienst voor Arbeidsvoorziening v van Gestel*, EU:C:1995:205, paragraph 29. On the status of Article 16 Agreements under international law, see *H.-D. Steinmeyer*, "Title II: Determination of the legislation applicable", in: *M. Fuchs and R. Cornelissen* (ed.), EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009, Baden-Baden, 2015, 190-191.

[235] CJEU Case 101/83, *Brusse*, paragraph 25.

[236] Observation of the Commission in CJEU Case 101/83, *Brusse*, at 2231.

[237] *De Pauw*, "Toepassingsproblemen bij artikel 17 van de Verordening (EEG) nr. 1408/71: visie van het Ministerie van Sociale Zaken, Volksgezondheid en Leefmilieu" in *Jorens and Geenen* (Ed.), *De toepassing van de Verordening (EEG) nr. 1408/71 in België* (die Keure, 1999), 124; *Jorens*, "Detachering en sociale zekerheid: het juridisch kader" in Jorens (Ed.), *Handboek Europese detachering en vrij verkeer van diensten* (die Keure, 2009), 88-89; Pieters and Schoukens, "Posting and Article 17 Agreements: Some Comments" in *Schoukens* (Ed.), *Prospects of Social Security Co-ordination* (Acco, 1997), 98; *Schoukens and Pieters*, "The Rules Within Regulation 883/2004 for Determining the Applicable Legislation", (2009) European Journal of Social Security, 81-117, 88, 108.

Moreoever the reverse situation can occur. Employees who are obliged to stay in the source State and exceed the 183 residence day-rule of Article 15 (2) of the OECD MC, will experience a shift of taxation rights from the State of residence to the source State.

The shift in taxation competence increases the administrative burden for both the employer and the employee. The employee may also face a drop in net income due to the change in his fiscal status due to the difference in levels of tax between the relevant States and a change in DTCs.

A result of the shift of the allocation of the taxation right from the State of work to the State of residence can be that a cross-border worker may not fulfil the criterion of the *Schumacker*-doctrine (see Chapter 3.3. and 3.6. of this Report) anymore and he will lose the facility to be treated as a resident taxpayer in the source State. According to the *Schumacker*-doctrine a non-resident taxpayer is entitled to the same tax facilities as a resident taxpayer provided that he is receiving his entirely or almost exclusively income in the source State.

In response to the **Covid-19 pandemic the OECD published recommendations** on 03 April 2020 regarding to tax consequences of the Covid-19 pandemic.[238] The following recommendations of the OECD are important for cross border workers: '*Where a government has stepped in to subsidise the keeping of an employee on a company's payroll during the Covid-19 crisis, the income that the employee receives from the employer should be attributable, based on the OECD Commentary on Article 15, to the place where the employment used to be exercised. In the case of employees that work in one State but commute there from another State where they are resident (cross border worker), this would be the State they used to work in*.'[239] In other words, working from home is ignored for the attribution of taxing rights. The source State still has the right to tax. Please note that the recommendations are not directly applicable to DTCs.

Another OECD recommendation concerns the **determination of a permanent establishment** (PE) for the employer for the purposes of the attribution of tax responsibility in the case of an employee working from home. Some companies were concerned that working from home would constitute a PE for them. In cases where there is a determined PE in the source State, this State may tax the income allocated to the PE (Article 7 of the OECD MC). The definition of a PE is stipulated in Article 5 of the OECD MC. The OECD commented that it is unlikely that the Covid-19 situation will create any changes to a PE determination. The exceptional and temporary change of the location where employees exercise their employment because of the Covid-19 crisis, such as working from home, should not create new PEs for the employer. Similarly, the temporary conclusion of contracts for work to be performed in the home of employees or agents due to the Covid-19 crisis should not create PEs for the businesses. A construction site PE would not be regarded as ceasing to exist when work is temporarily interrupted.

The OECD explained that in general, a PE '*must have certain degree of permanency and be at the disposal of an enterprise in order for that place to be considered a fixed place of business through which the business of that enterprise is wholly or partly carried on'*. And that is not the case because of Covid-19. Individuals who stay at home to work remotely during the pandemic are typically doing so as a result of government instructions - working from home is not a requirement of the employer but rather a consequence of *force majeure* and the governmental response to it. Therefore, considering the extraordinary nature of the Covid-19 crisis, and assuming that it does not become the new norm over time, teleworking from home (i.e. the home office) would not create a PE for the business/employer, either because such activity lacks a sufficient degree of permanency or continuity or the employer enterprise has no access to or control over the

[238] OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis, 03.04.2020.
[239] OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis, 03.04.2020, paragraph.20, p. 5.

home office of an employee. In addition, the usual work space remains available to the employee as in normal working times.[240] The OECD stressed that this is only applicable in '*the extent that it does not become the new norm over time'.* It seems that a PE of the employer may be constituted where an employee continues to work from home beyond the pandemic. This may have fiscal consequences for the employer such as a withholding tax obligation in the State where the employee resides and works.[241]

To avoid the above-mentioned consequences many Member States have taken measures with respect to taxation at the outset of the pandemic (see answers of the MoveS national experts to the questionnaire – Chapter 4 and the Annex of this Report).[242] Most of the (Member) States followed the OECD recommendations: for instance **Austria, Belgium, Switzerland, Germany, Denmark, Estonia, France, Italy, Latvia, Luxemburg, Lithuania**, the **Netherlands** and **Sweden** ignored the working from home for cross-border workers for DTC purposes. Days which would otherwise be spent in the State of residence or in a third State would not count as days spent in the State of work. The measures are a deviation of Article 15 of the OECD MC and are laid down in agreements or protocols with the neighbouring countries. The conditions differ from country to country. Some agreements also contain provisions regarding certain social security contributions. For instance, the agreement between the **Netherlands and Germany** contains a temporary provision for the so-called "Kurzarbeitergeld". Member States ask for information regarding the number of days which are worked from home. For example **Belgium** is asking for a proof of days worked from home due to Covid-19 by way of a statement from the employer and proof that the income in respect of those days working at home has actually been taxed in the State of work.

Several problems and uncertainties regarding to the attributable taxing rights have appeared during the pandemic. One problem is e.g. in case a cross-border worker receives a **subsidy instead of salary**. The OECD recommends that these payments should be attributable to the place where the employment used to be exercised. Some stimulus packages adopted or proposed by government, e.g. wage subsidies are designed to keep workers on the payroll. To the extent that these payments may be the last payments received in respect of the employment, these payments resemble termination payments. According to paragraph 2.6 of the Commentary to Article 15 of the OECD MC these payments should be attributable to the place where the employee would otherwise have worked.[243] Related to this issue is a possible problem of the withholding obligations which are no longer underpinned by a substantive taxing right. These withholding obligations, whereby tax is often withheld at source, would therefore have to be suspended and the employee could face a new or enhanced liability in his State of residence. For both employer and employee this change would result in compliance and administrative costs. Changes in the jurisdiction where an employee exercises the employment can have an impact where the employment income is taxed.

Another problem is the **exceeding of the 183 days** due to the fact that the cross-border worker has to stay in the source State. Will there be a shifting of taxation rights from the residence State to the source State? The OECD argues that it would be reasonable for a jurisdiction to disregard the additional days spent under such circumstances for the purposes of the 183-day rule in Article 15 (2) (a) of the OECD MC. However, e.g. **Sweden** does not subscribe to this approach.[244]

[240] OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis, 03.04.2020.
[241] E.g. in the NL there will be a wage tax obligation for the employer. The PE may also have consequences for the corporate income tax.
[242] See e.g. https://www.norden.org/en/publication/nordic-border-communities-time-covid-19.
[243] Updated guidance on tax treaties and the impact of the COVID-19 pandemic, 21.01.2021, paragraphs 49 and 50.
[244] Ibid., paragraph 56.

In addition to the so-called 183 day residence rule some Member States have special provisions in their DTCs that deal with the situation of cross-border workers. The allocation of taxing rights is different from Article 15 of the OECD MC. These provisions apply to the income and often contain limits in the number of days that a cross-border worker is allowed to work outside the jurisdiction he/she regularly works before a change in fiscal status can occur. Examples are DTCs between Germany and France, France and Belgium, Belgium and Luxemburg, France and Belgium or Luxemburg and Germany. The number of days can for instance be 19 or 45 days. Due to the pandemic the maximum of days working in the State of residence may be exceeded. It is in many cases accepted that the pandemic should not affect the relevant national provisions on the duration of residence for fiscal purposes.[245]

5.6.3 How to proceed after the pandemic?

The measures taken in the fields of social security and taxation seem to be driven by the same purpose: to **avoid unnecessary changes of applicable legislation and competences due to the increased necessity of teleworking due to the pandemic**. Of course, this can only safeguard the status quo. Pre-existing problems that arose before the pandemic because of different States being competent to levy taxes and social security contributions (see especially Chapter 5.1 of this Report) remain.

Evidence suggests that both employers and workers wish to continue working from home once the pandemic has ceased. This leads to political debates concerning changes of the existing systems. E.g. the **Benelux** Interparliamentary Assembly is asking the respective governments:

- to study and evaluate the advantages and obstacles associated with teleworking, in particular for cross-border work in the Benelux, and to formulate a policy;
- to study and implement a harmonized policy with regard to the tax and social security position of frontier workers within the Benelux, including self-employed entrepreneurs, members of the liberal professions, company managers and posted persons;
- to study the possibility of uniformly increasing the number of working days allowed outside the State of work to 48 for frontier workers of the three Benelux countries, which means that a frontier worker can work one day a week from home. In the current DTC between **Luxemburg and Belgium, Luxemburg and France or Luxemburg and Germany** it is stipulated that frontier workers are allowed to work in their State of residence for 24, respectively 29 and respectively 19 days without changing the taxing rights. They will be fully taxed in their regular State of work;
- to study the introduction of a harmonized tax and social security position for frontier workers wo work in a remote office in their State of residence;
- to examine the harmonization of the tax and social security position of employees in distance offices and of homeworkers or promote the use of remote offices, which more than working from home facilitate efficient working in a suitable working environment;
- to unify the definitions of the categories of persons to whom the requested measures will apply.[246]

Another initiative is the exploration by the Dutch and German authorities to agree on a protocol to the **Dutch-German DTC** concerning the allocation of taxing rights of the

[245] See also Updated guidance on tax treaties and the impact of the COVID-19 pandemic, 21.01.2021, paragraphs 57 and 58.

[246] Recommendations on improving the situation of frontier workers in terms of mobility, taxation and social security, in particular by granting a specific status to remote offices (Aanbevelingen met betrekking tot de verbetering van de situatie van grenswerknemers op het vlak van mobiliteit, fiscaliteit en sociale zekerheid, in het bijzonder door toekenning van een specifiek statuut aan de afstandskantoren), Benelux Interparlementaire Assemblee, 21.03.2021, No 920/2,

days that a cross-border worker works from home.[247] It is important to mention that, when the measures regarding tax consequences related to working from home are formulated, the legislator should also take into account the social security consequences of working from home. Otherwise 'forum shopping' can occur. One has to taken into account that the coordination rules of taxation and social security are different. The coordination of taxation is a bilateral matter, while the social security is a matter of EU law which is binding for all the Member States involved.

Regarding the above described problem of determining a PE for the foreign employer in case a cross-border worker works at home, the OECD stated the following: '*If an individual continues to work from home after the cessation of the public health measures imposed or recommended by government, the home office may be considered to have certain degree of permanence. However, that change alone will not necessarily result in the home office giving rise to a fixed place of business PE. A further examination of the facts and circumstances will be required to determine whether the home office is now at the disposal of the enterprise following this permanent change to the individual's working arrangements.*'[248] The OECD continues to remark that according to paragraphs 18 and 19 of the Commentary to Article 5 of the OECD MC an important factor for the determination is whether the individual is required by the enterprise to work from home or not. '*Paragraph 18 explains that where a home office is used on a continuous basis for carrying on business activities for an enterprise and it is clear from the facts and circumstances that the enterprise has required the individual to use that location (e.g. by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office), the home office may be considered to be at the disposal of the enterprise. As an example, paragraph 19 notes that where a cross-border worker performs most of their work from their home situated in one jurisdiction rather than from the office made available to them in the other jurisdiction, one should not consider that the home is at the disposal of the enterprise because the enterprise did not require that the home be used for its business activities.*'[249]

The current DTCs regarding employment are in general based on Article 15 of the OECD MC. This means that the criterion of physical presence is important. However, in case of telework or working from home this criterion might not not be as suitable as it was previously leading to the need for a new criterion. In the so-called BEPS (Base Erosion and Profit Shifting) plans the digital new economy is discussed in relation to profits of companies and the criterion 'income has to be taxed where actual business activity is performed and where value is created' is introduced.[250] Maybe Article 15 of the OECD MC has to be reformulated to reflect this thinking. It should be noted that teleworking had already become increasingly more prevalent prior to the pandemic. It is suggested that the current understanding of how employment income is taxed might need revisiting due to the changes in the traditional patterns of working.[251] Future methods of working post pandemic will be indicative of how this issue ought to be addressed.

To date, with respect to **social security coordination,** there have been no firm proposals to rework the rules on applicable legislation to take into account the increase of telework. Nevertheless, it is recommended to start the discussion on this issue to safeguards rules on applicable legislation, which reflect the development of work patterns and which could create a better level of preparedness should there be another pandemic necessitating restrictive measures comparable to those necessitated by Covid-19 (see Chapter 6.3.of this Report).

[247] Nederland en Duitsland wijzigen het belastingverdrag | Nieuwsbericht | Rijksoverheid.nl.

[248] Updated guidance on tax treaties and the impact of the COVID-19 pandemic, 21.01.2021, p. 3, paragraph 17.

[249] Ibid, paragraph 18.

[250] *A.C.G.A.C. de Graaf, N.M. de Haas, & A.F.M. Werger*,"Invloed coronarestricties op heffingsverdeling voor grensoverschrijdende werknemers", MBB 2020, No 9, p. 365. See https://www.oecd.org/tax/beps.

[251] *Svetislav V. Kostić*, "In search of the Digital Nomad – Rethinking the Taxation of employment Income under Tax Treaties", World Tax Journal 2019, p. 224. Also see *W. Schön*, "Ten Questions about Why and How to Tax Digital Economy", Bulletin for International Taxation, IBFD 2018 (Vol. 72), No 4/5.

6. RECOMMENDATIONS FOR POSSIBLE FUTURE ACTIONS

Since the 2014 FreSsco Report not many developments can be reported concerning further actions at EU level, apart from the judgments of the CJEU clarifying the borderline between the contributions co-ordinated under Regulation (EC) No 883/2004 and those which remain outside the ambit of social security within the meaning of that Regulation. Nevertheless, there appears to be a lot of uncertainty for the experts of the Member States, as was revealed on the occasion of the Webinar organised by the MoveS network on this topic on 2 October 2020. The issues analysed in this Report also show that the existing situation (especially when different Member States are competent) is not satisfactory given the results of the application of the social security and the taxation rules. This issue would merit further reflection with a view to solving inconsistencies and the consequences thereof between the two regimes.

Many of the previous recommendations of the 2014 FreSsco Report remain relevant. Some of the possible further steps, which merit further analysis, will be listed below; the pros and cons of each possible solution are sketched.

6.1 Exchange of information and awareness raising

It seems that the interaction between the coordination Regulations and taxation rules (especially DTCs) is not particularly high on the agenda of the official bodies competent for these two different fields of law (e.g. since the publication of the 2014 FreSsco Report this issue has not been on the agenda of the Administrative Commission). Linking the knowledge between these two fields at the level of the responsible officials is totally missing. Issues raised in the answers of the questionnaire to this report suggest that further analysis is needed in certain areas. This includes combined efforts of social security and tax authorities to control better cross-border cases (e.g. via data mining and data matching, bilateral Memorandum of understanding [MoUs] or agreements, exchange of information between tax and social security authorities).

Proposal No 1: Joint meeting of the Administrative Commission and the experts working within e.g. the OECD on the OECD MC

The organisation of a meeting e.g. a workshop or a seminar between experts amongst the bodies responsible for both fields of law[252] whereby they share their knowledge and the problems they encounter in their respective fields of law could be envisaged and could be expected to be productive. Such a meeting could be organized by the relevant General Directorates of the European Commission.

Pros: This could help to raise the awareness amongst the experts of both fields of law and could also contribute to the mutual taking into account of both tax and social security in decision making (e.g. if the Administrative Commission proposed amendments to Regulation (EC) No 883/2004[253] the effects of these amendments on taxation and the persons concerned could be taken into account). In case of tax-financed social security systems such a cooperation seems to be of particular importance.

Cons: There appear to be hardly any. But, of course, such a meeting would necessitate careful preparation. The starting point would be the drafting of a paper to structure such a discussion effectively.

Proposal No 2: Elaboration of a paper of the Administrative Commission to be sent to the OECD tax experts

[252] In the OECD this could be the Working Party No. 1 of the OECD's Committee on Fiscal Affairs.
[253] Under Article 72 (f) of Regulation (EC) No 883/2004.

The Administrative Commission could further analyse the impact of DTCs on the situation of persons in cross-border situations seen in the light of the effect Regulation (EC) No 883/2004 has on the social security coverage. The aim of this analysis could be a recommendation to the OECD on how the tax coordination should be made to avoid problematic outcomes taking into account the interaction between the two fields of law. This could include the different competences to levy social security contributions and taxes in case of cross-border activities but also the taxing of social security benefits or the granting of tax advantages that are linked to risks covered by Regulation (EC) No 883/2004. As a final result this could lead to a proposal for special rules in the OECD MD for DTCs between Member States to better take into account the interaction with Regulation (EC) No 883/2004. E.g. it could be proposed not to include the socially earmarked taxes in DTCs, which have to be coordinated under Regulation (EC) No 883/2004, and thus avoid e.g. the consequences of the *Derouin*-ruling,[254] or to explicitly exclude from DTCs social tax benefits that have to be coordinated as social security benefits under Regulation (EC) No 883/2004.[255]

Pros: This proposal could be the beginning of an intensive discussion also of tax issues with an impact on the social security coordination within the Administrative Commission and, thus, to a further knowledge and awareness within this group. This discussion could result ultimately in the elaboration of a model within the OECD, which avoids some of the problems encountered and mentioned in this Report.

Cons: Taking into account the different national models of social security and taxation it could be difficult to agree within the Administrative Commission on a single solution, which fits all Member States. In addition, it might not be realistic to expect the OECD MC to be amended on the basis of the recommendation of some States only. Would it be possible to create a specific OECD MC only for the EU Member States? It has also to be taken into account that even in case of such a specific solution for some Member States this would have to be transposed into new bilateral DTCs in between all Member States. Therefore, the attempt to create a specific OECD MC to accommodate the problems created by the interaction of the OECD MC and Regulation (EC) No 883/2004 does not seem to be very realistic. But, producing a paper analysing the problems could lead to awareness raising both in the Administrative Commission and also in the OECD bodies competent for double taxation and would thus serve a useful purpose.

6.2 Better cooperation between social security institutions and tax authorities

The replies to the questionnaire show that there is some cooperation between social security institutions and tax authorities at national level. However, in cross-border situations such cooperation is not that frequent. Nevertheless, as tax evasion and not paying social security contributions could be regarded as a common phenomenon of cross-border fraud, closer cooperation might be advisable. Of course, this raises the question concerning the legal basis for such cooperation. Be that as it may, at national level an increased exchange of experiences between social security and tax authorities with a focus on cross-border cases seems to be advisable, even if this is not that easy at European level. Nevertheless, leaving aside the question of legal basis, informal encounters, awareness raising and exchange of information between the tax and social security experts at European level is always possible and advisable and should not in any way be discouraged by the pursuit of any of the concrete proposals set out below.

[254] CJEU case C-103/06, *Derouin*, EU:C:2008:185, see also Chapters 4.3.2.2. and 4.3.2.3. of the 2014 FreSsco Report.

[255] Thus today's situation under which comparable benefits are treated either as social security (CJEU case C-177/12, *Lachheb*, EU:C:2013:689) or as tax benefit (CJEU case C-303/12, *Imfeld and Garcet*, EU:C:2013:822) could be avoided.

Proposal No 4: Different solutions for data mining and data matching to avoid misuse and fraud in cross-border situations

Member States have their own different national databases concerning the persons covered by social security and tax and from the questionnaire it appears that despite best efforts, it does not appear that all Member States are making optimal use of the existing databases not only to detect noncompliant behaviour but also to help employees/employers to fulfil their obligations.

Therefore, it may be recommended that Member States learn from each other. There is already a lot of knowledge and experience on local and EU level. This can be built upon. Lack of awareness or efficient use of the available data and data mining practices can be solved by sharing good practices, joining forces and cooperating closely.

Member States may be further encouraged to foresee a layer of dashboarding connecting the different existing data points (both from tax and social security authorities) and thereby adding a dimension on existing platforms. This should eventually result in a more efficient collaboration between tax and social security authorities, which is, as mentioned, in the interest not only of the Member States but also of mobile employees and their employer(s).

Pros: A more compliant and efficient execution of existing regulations, in the interest of the Member States, employers and employees.

Cons: Need to review computability with human rights and privacy (including all the aspects of data-protection); adding this additional layer of dashboarding over big data and potential datamining, requires therefore clear legislation to guarantee at all times the ethical use of private data in balance with the human rights of the mobile employees.[256]

6.3 Clarifications and, possibly, reforms in the field of social security and tax coordination

One of the main problems for the administration and interpretation of the social security coordination system is the lack of clear definitions, such as which levies have to be coordinated under Regulation (EC) No 883/2004 as "social security contributions" and which fall outside its material scope; the rulings of the CJEU are only a piece-meal approach developed in the context of particular cases from which it is not easy to deduce common principles which can be applied in all EU Member States. The same applies to the question of which elements of income can be levied by the Member State competent under Regulation (EC) No 883/2004.

Proposal No 5: Defining "social security contributions" and their assessment base Various solutions are available to clarify what constitutes a 'social security contribution', including a Decision, Recommendation or Resolution[257] of the Administrative Commission. Additionally it might also be interesting to define the benefits covered by Regulation (EC) 883/2004 and make clear that they include social tax benefits whenever one of the risks mentioned in Article 3 of Regulation (EC) No 883/2004 is involved.

[256] See for example *G. Mazzoni*, (Re)defining the Balance between Tax Transparency and Tax Privacy in Big Data Analytics, 72 Bull. Intl. Taxn. 11 (2018), Journal Articles & Papers IBFD, Published online: 24.10.2018, or *Elise Degrave,* The Use of Secret Algorithms to Combat Social Fraud in Belgium, European Review of Digital Administration & Law – Erdal 2020, Volume 1, Issue 1-2, June-December, p. 167-177.

[257] A resolution might be the best instrument for such an interpretive document – see as a model the resolution of the Administrative Commission concerning criteria for the inclusion of benefits as "special non-contributory benefits" in Annex II, Section III or in Annex IIa of Regulation (EEC) No 1408/71, OJEU No C 2001/44, p. 13.

Pros: Such an attempt could clarify the borders of social security contributions and benefits under Regulation (EC) No 883/2004 and could help to avoid different approaches in the Member States depending on the national taxation systems. This could help to ensure that all levies meant to directly or indirectly finance social security are coordinated under Regulation (EC) No 883/2004. It could also help that tax benefits, which are linked to one of the risks covered by that Regulation (e.g. meant to unburden families), are all coordinated under Regulation (EC) No 883/2004 to achieve a synchronized coordination for comparable benefits.

Cons: It might be difficult to elaborate a definition, which is clear, abstract enough and at the same time reflects the case law of the CJEU. Some Member States might be reluctant to accept such a definition, for fear that it would broaden the scope of application of Regulation (EC) No 883/2004 compared to the status quo.[258] It could be that, although the definitions are abstract enough, they might not address all the issues arising out of new schemes or benefits emerging in Member States. Other problems could arise because up until now a different approach has been applied by Member States (e.g. tax benefits have been only dealt with under the DTC although they were linked to a social risk) which was regarded as satisfactory.

Proposal No 6: General attempt to synchronise the competences to levy taxes and social security contributions

As already explained in the 2014 FresSco Report and also further elaborated in this Report (see especially Chapters 5.1.3., 5.3. and 5.5.3.), it could be advantageous for the competence to levy taxes and social security contributions to lie within one Member State, rather than being split between Member States. This could be achieved either for all cases or for specific cases (by synchronising e.g. the rules on posted employees or the notion of employer).

Pros: This could dramatically avoid the negative consequences discussed in Chapter 5 of this Report (excessively or insufficiently burdening the person concerned by levies that are too high or too low). It could avoid the situation where, because general taxation is used to finance social security, a person has to contribute to the financing of social security in more than one Member State at the same time or in no Member State. Administrations could benefit from such a solution as tax and social security authorities could co-operate in cross-border cases.

Cons: A change to the OECD MC seems to be more cumbersome and less practical (see Proposal No 2) than would be amendments of Regulation (EC) No 883/2004, to bring this Regulation in line with the OECD MC. This would alter some of the basic principles of Regulation (EC) No 883/2004, as e.g. the posting duration (reducing the 24 months to 183 days). Bearing in mind how sensitive all provisions on applicable legislation are, it would be rather difficult to achieve the necessary acceptance of all Member States to such an amendment. Care must be taken to ensure that any rule common to tax and social security is suited to those different fields of law.

Proposal No 7: Synchronized solutions for the increasingly important telework

As has been shown in Chapter 5.6 of this Report, telework increased during the pandemic and will remain important also after the pandemic. In cross-border situations, this could have an impact on the competences under the coordination Regulations and under DTCs. Employers of such persons engaged in cross-border telework and the employees themselves are usually interested in keeping the social and tax competences which applied before (the increase in) telework. As this new development affects both fields of

[258] This was the case with the new definition for "long-term care benefits" under the pending reform of Regulations (EC) No 883/2004 and 987/2009.

law a synchronized solution could be developed. The aim could be to make the same State competent for social security under Regulation (EC) No 883/2004 and for taxation under a DTCs where only one employer is involved.[259] This would only be possible by combined efforts. It can be assumed that in the longer run in the case of DTCs this would result in amendments to the OECD MC. In this case the Administrative Commission and the OECD experts should start co-ordinating their work as quickly as possible.

As has become evident from the replies of the MoveS national experts (Chapter 4.3. and 4.4. of this Report) working on this topic would also necessitate some clarifications concerning the terms "telework" and work from "home-offices" as some Member States see differences between those two while others do not. As explained in Chapter 5.6. of this Report, a common definition would be necessary.

Pros: This could be a first step of closer cooperation between the two fields of law restricted to a specific issue, which could be regarded as amendable. A coordinated approach could avoid negative effects for this group of persons with regard to the interdependencies between social security and taxation. It could serve as a model for further coordinated steps between these two fields of law. The advantage of this effort would be that it might be an issue where under both fields of legislation amendments are considered as useful and necessary. This is the most important difference compared to the Proposal No 6, which would necessitate also amendments of rules, which – *per se* – are seen as useful and not necessary to change as long as there is no linkage with the other field of law.

Cons: It is not easy to predict if such amendments will be sought under both fields of law. Taking into account the existing differences between social security and tax coordination, it might be rather difficult to achieve a common approach for these specific persons. The pace of reform might differ dramatically. Even if a common approach (concerning the content of the reform safeguarding that one state is responsible for social security and taxation of these persons) is possible, the slower process could delay the whole reform in the other field of law.

[259] In cases of more than one employer, this could become too complicated.

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