

Cross-border impact assessment 2018

Dossier 4: Baukindergeld



Maastricht University

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Abbreviations

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

4. Baukindergeld

1. Introduction

The German *Koalitionsvertrag*¹ (Coalition Agreement) between political parties CDU, CSU and SPD includes the agreement to introduce a benefit aimed at promoting the home ownership of young families within the framework of the *Wohnraumoffensive* (the Merkel government's national building scheme). The *Baukindergeld* is a child-dependent benefit that can be made available over a period of ten years to assist with the purchase of an existing dwelling or a dwelling that has yet to be built in Germany. The benefit amounts to EUR 1,200 per child per year (up to 25 years of age).²

The conditions for receipt of the 2018 *Baukindergeld* benefit have not yet been published in full³, although it is clear that the benefit is granted to families with at least one child.⁴ Another requirement is the purchase or construction of a dwelling. The grant is also contingent on an income ceiling: the annual taxable household income must not exceed € 75,000, a threshold that increases by € 15,000 for every child. This income limit is calculated by taking the average of the annual incomes of the past two calendar years. Depending on the number of children, the annual benefit amounts to:⁵

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

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

The *Baukindergeld* is the outcome of the *Bausparkindergeld*, a public financial support scheme for the purchase of a private home launched by the CDU (Christian Democrats) in its election programme for the elections of 24 September 2017, when Germany was doing better financially.⁶ At the time, the SPD (Social Democrats) advocated its own scheme: *Familienbaugeld*. CDU and SPD had abolished government support for the purchase of a private home in 2005 as part of cutback measures.

¹ Accessible via: https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1.

² Construction costs for 2018 are estimated at EUR 263 million. EUR 3 billion has been reserved for subsequent accounting years. See: <https://www.vergleich.de/baukindergeld.html>.

³ On 23 June 2018 a legislative proposal to the Budget Committee included a floor area of 120 square metres for a family of four, with an additional 10 square metres per child. At the end of June it was announced that families who exceeded this threshold were not eligible for funding.

⁴ An estimated 58,000 young families would receive the *Baukindergeld*.

⁵ The government of the Free State of Bavaria demanded an additional benefit scheme for Bavaria on 15 May 2018: the *Baukindergeld Plus* scheme, as well as a separate home ownership grant. The *Baukindergeld* as planned by the federal government would have to be increased by EUR 300 euro per year per child in Bavaria, amounting to an additional EUR 3,000 in the 10-year term of the benefit scheme. The scheme must include a grant of EUR 10,000 for home ownership, regardless of marital status, i.e. also for childless and unmarried couples. This amount should be paid as a single lump sum. No further details have been provided for both grants, which are meant to be payable as of September 2018. See: <http://www.aktion-pro-eigenheim.de/haus/news/fuer-familien-in-bayern-gibt-es-noch-mehr-baukindergeld.php>

⁶ Germany has no scheme that allows for mortgage interest deduction from one's income, like the Netherlands has.

To date, the benefit has no legal basis.⁷ On 4 February 2018 CDU and SPD agreed on the introduction of the *Baukindergeld* scheme during coalition negotiations. The coalition agreement subsequently confirmed this agreement. A law still needs to be passed, however, which is due in the autumn of 2018. The scheme will apply retroactively from 1 January 2018⁸, applying the right to *Baukindergeld* to all new purchase contracts concluded or building permits issued for private property in Germany since 1 January 2018. Projects that do not require a building permit are entitled to new-build construction grants, provided that the municipality has been informed in accordance with construction regulations and the implementation of these projects was approved after 1 January 2018. Although it is still uncertain whether this scheme will actually be implemented (SPD members still have to vote) or how the agreements will be fleshed out legally, a number of general concerns based on European legislation can be voiced about the implications of this benefit scheme for cross-border workers. It is evident, in any event, that housing for young families must be made more affordable.

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

Approach

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

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

2. Research Objectives, Definitions, Themes and Indicators

2.1 Current or future effects, objective: ex-ante analysis

This dossier contains an ex-ante analysis of the cross-border effects of the *Baukindergeld* in the border regions of Germany, focussing on the legislative proposal for the introduction of the *Baukindergeld*. The main objects of research are the negative cross-border effects, i.e. the bottlenecks and shortcomings of the planned proposal. The proposal particularly affects families that reside outside

⁷ <http://www.aktion-pro-eigenheim.de/haus/news/baukindergeld-2018-ein-update-zur-baupoerderung-fuer-familien.php/>

⁸ <http://www.faz.net/aktuell/wirtschaft/kompromiss-beim-baukindergeld-flaechenbegrenzung-aufgehoben-15661576.html>.

Germany with one or both parents working in Germany. This concerns Dutch, Belgian, Luxembourg, Polish, French, Swiss and Czech cross-border workers in Germany.

In national legislation, on the other hand, the cross-border effects are less prominent and therefore, unfortunately, underexposed in the legislative process. This cross-border impact assessment seeks to compensate for a lack of border-impact assessment at legislative level by using a coherent tool for this purpose, which will be explained below under 'Principles, Benchmarks and Indicators'. This lack refers to the absence of a separate section that outlines the consequences of the *Baukindergeld* scheme for cross-border workers. In 2009 and 2012, for example, two motions were tabled asking that permanent attention be paid to the problems of cross-border workers.⁹ In 2015 a number of political parties repeated their desire for clarification of the effects of legislative proposals on the border regions during the legislative process, in the interest of performing a cross-border impact assessment.¹⁰ From a Dutch perspective, we recommend that Germany also put effort into assessing the cross-border effects of German law. Note that, during the parliamentary proceedings of the Netherlands-Germany tax treaty, a separate section was included in the Explanatory Memorandum on the impact on cross-border workers. This resulted from the fact that a tax treaty, by nature, covers cross-border employment, among other things.¹¹

Despite the considerable efforts made by the EU to facilitate and promote the mobility of labour, the percentage of EU citizens who actually cross the border for work, whether as an employee or self-employed, remains relatively low. Only 0.9% of all workers in the EU use this opportunity. In some areas, however, such as certain border regions of Austria, France, Germany, Belgium and The Netherlands, the number of frontier workers lies well above this percentage.¹² It is precisely for this reason that cross-border impact assessments are useful and that the border regions deserve special attention. In short, this report uses the following definition of border region: an area separated by national borders in which cross-border employment occurs.

A quantitative analysis of the effects of the *Baukindergeld* scheme is not possible due to a lack of adequate data. Most of the figures on cross-border employment are somewhat dated and not entirely representative, since the meaning of the term 'cross-border worker' was not defined or used consistently, making it unclear who fell within the definition. In addition, these data on cross-border

⁹ *Kamerstukken II 2011/12, 33000 IXB (motion Bashir) and Kamerstukken II 2009/10, 26 834, No. 26 (motion Weekers)* on the importance of addressing the problems of cross-border workers. See also Commissie grenswerkers, *Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, pp. 269-270.

¹⁰ *Handelingen II 2014/15, nr. 50, p. 1 -15 (Cross-Border Impact Assessment)*.

¹¹ *Kamerstukken II 2013/14, 33 615, nr. 3 (Explanatory Memorandum)*, section I.4 Grensarbeiders (on cross-border workers). The inclusion of this paragraph reflects the commitment made by former Secretary of State for Finance De Jager to explicitly include the consideration of the consequences for frontier workers in new legislation (see the Cabinet's Opinion on the recommendations by the Frontier Worker Commission, 9 January 2009, 2008/2455 BCPP with reference to *Kamerstukken II 2000/01, 26 834, No. 5*).

¹² Eurostat, Statistics on commuting patterns at regional level, ec.europa.eu/Eurostat (geraadpleegd 10 juli 2017); and Benelux Unie, Secretariaat-Generaal, Benelux, Kerncijfers en trends 2014, p. 41. This also shows that cross-border labour in the Benelux, France and Germany constitutes 37% of total cross-border mobility within the EU.

employment were not mapped in a coherent way, i.e. their reliability could be called into question, especially when encountering rounded numbers.¹³

2.2 Effects: on which geographical area? Definition of the ‘border region’

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

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

2.3.1 The research themes of the Baukindergeld Dossier

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

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

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

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

¹³ See also the recommendation of the Commissie grenswerkers, *Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 34.

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

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

2.4. Qualification of the advantage: social or fiscal?

Pursuant to Article 7, paragraph 2 Regulation (EU) No 492/2011 of 5 April 2011 on the free movement of workers within the EU¹⁴, migrant workers enjoy the same tax and social security advantages in the host country as domestic workers. The Court of Justice (hereafter ECJ) has defined these advantages as '*all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community*'.¹⁵

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

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

On the other hand, German *Baukindergeld* could also be classified as a social advantage.¹⁶ The ECJ's interpretation of the concept of 'social advantages' is very broad, including benefits that fall within the material scope of Regulation (EC) No 883/2004,¹⁷ as well as other social benefits, such as discount cards for public transport.¹⁸ The *Baukindergeld* should also be granted to cross-border workers and/or their spouses who are not tax subjects in Germany at all. The concept of 'social advantage' also includes advantages that are granted simply because the beneficiaries reside within the national territory. Cross-border workers are typically in the same position as workers residing within the national territory. The German scheme, which excludes cross-border workers from this benefit, thus constitutes hidden discrimination and is consequently in breach of the free movement of persons as well as of Article 7, paragraph 2 of Regulation (EU) No 492/2011. Since the *Baukindergeld* must be regarded as an advantage pursuant to Article 7, paragraph 2 of Regulation (EU) No 492/2011, cross-border workers who work in Germany are entitled to it.

¹⁴ Regulation (EU) No 492/2011 of the European Parliament and of the Council of 05 April 2011 on the free movement of workers within the Union, OJ L141/1.

¹⁵ ECJ 12 May 1998, C/85/96, *Martínez Sala*, Rec. 1998, point 25.

¹⁶ See opinion by G. Essers, 'Heeft een grensarbeider aanspraak op het Duitse Baukindergeld? Ja!', accessible via <https://aha24x7.com/heeft-een-grensarbeider-aanspraak-op-het-duitse-baukindergeld/>.

¹⁷ The same applies to special, non-contributory benefits. See: ECJ 11 September 2007, C-28 8/05, *Hendrickx*, ECR 2007, I-6909.

¹⁸ ECJ 30 September 1975, C-3 2/75, *Cris Tini*, ECR 1975, I-1085.

There is no entitlement to *Baukindergeld*, however, under Regulation (EC) No 883/2004. Unlike the German *Familienleistungen* (family benefits including the *Kindergeld* child benefits),¹⁹ the German *Baukindergeld* scheme cannot be classified as a social security benefit under European Coordinating Regulation (EC) No 883/2004.

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

3.1 No *Baukindergeld* for cross-border workers

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

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

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

Cross-border workers whose domicile is not on German territory are paying wage tax in Germany. A German residence requirement would exclude resident tax payers in Germany under German law (*unbeschränkte Steuerpflicht*), including non-residents with more than 90% German-source income, who are owners of their home which is located outside Germany from the German *Baukindergeld* scheme. Their country of residence usually doesn't offer them any tax benefits that encourage home ownership either, as their incomes there will generally be insufficient to be eligible for mortgage interest relief. As a consequence, they fall between two stools.²⁰

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

¹⁹ Pursuant to the European Regulation (EC) No 883/2004 on the coordination of social security systems, a cross-border worker is entitled to the German *Familienleistungen* (Family benefits, e.g. *Kindergeld* [child benefit]). If one parent works in the Netherlands and the other parent works in Germany, the Dutch child benefit ranks first for payment. Germany must then supplement ('*aufstocken*') the Dutch child benefit to the applicable German level to achieve equal treatment in the country of residence and in the country of employment.

²⁰ Taxpayers in the Netherlands can pass on a surplus of foreign *Box 1* income (i.e. income liable to income tax) from one year to another, the so-called 'postponement scheme' or 'storage scheme'. See Article 11 *Besluit voorkoming dubbele belasting 2001* (Decision on the prevention of double taxation).

²¹ See ECJ rulings 26 October 2006, the *Commission v Portugal*, C-345/05, *REC.* 2006, I-10633, point 13; ECJ 11 September 2007, *Commission v Germany*, C-318/05, *ECR* 2007, I-6957, point 35.

Any nationals of a Member State who exercise or have exercised the right of free movement of workers or the freedom of establishment and freedom of professional activity in a Member State other than their state of residence fall within the scope of Articles 45 and 49 of the TFEU, irrespective of their place of residence and nationality.²² The provisions of the Treaty pertaining to the free movement of persons are designed to make it easier for EU subjects to pursue any profession throughout EU territory, while preventing any measures that treat these subjects adversely in pursuing an economic activity in the territory of another Member State.²³

The principle of equal treatment as laid down in Article 45 TFEU and Article 7 of Regulation (EU) No 492/2011 of 5 April 2011 not only prohibits overt discrimination by nationality but also all covert forms of discrimination which, by applying other criteria of differentiation, lead in fact to the same result.²⁴ Unless objectively justified and proportionate to the objective pursued, a provision of national law must be regarded as indirectly discriminatory when it is more likely to affect its migrant workers than its domestic workers and is therefore more likely to lead to adverse treatment of migrant workers in particular.²⁵ This is the case with a residence requirement, which domestic workers will find easier to meet than workers who are nationals of another Member State.

Provisions that prevent or discourage nationals of a Member State from leaving their country of origin to exercise their right of free movement thus form barriers to this freedom, even when they are independent of the nationalities of the workers concerned.²⁶ In this dossier, it is the *Baukindergeld* scheme that adversely treats cross-border workers who work in Germany and are building or acquiring a dwelling in the territory of another Member State to live in themselves. They are not eligible for the benefit under the current provisions, even though people who are in the same situation from an income tax point of view and are residing in Germany or are making Germany their place of residence by building or buying a house there *are* eligible for this benefit. In these circumstances, the benefit has a discouraging effect on cross-border workers who work in Germany, are enjoying the freedom of movement pursuant to Articles 45 and 49 TFEU and want to build or acquire an owner-occupied dwelling in another Member State. It follows that the *Baukindergeld* scheme violates the free movement of workers and the freedom of establishment as guaranteed by Articles 45 and 49 TFEU by imposing the condition that the owner-occupied property that is being constructed or acquired be situated on German territory.²⁷

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

²² In the same vein, see also the ECJ rulings of 21 February 2006, C-152/03, *Ritter-Coulais*, ECR 2006, I-1711, point 31; ECJ 7 September 2006, C-470/04, *N, Jur.* 2006, I-7409, point 28, and ECJ 18 July 2007, C-212/05, *Hartmann, Jur.* 2007, I-6303, point 17.

²³ ECJ 15 September 2005, C-464/02, *Commission v Denmark*, ECR 2005, I-7929, point 34; and ruling ECJ 11 September 2007, *Commission v Germany*, cited above, point 114.

²⁴ ECJ 23 May 1996, C-237/94, *O'Flynn*, ECR 1996, I-2671, point 17.

²⁵ ECJ 23 May 1996, C-237/94, *O'Flynn*, ECR 1996, I-2671, point 20.

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

²⁷ Cf. ECJ 26 October 2006, C-345/05, *Commission v Portugal*, ECR 2006, I-10633, point 25.

provided they are taken in pursuit of a general interest, are suitable for securing this interest, and do not go beyond what is necessary to attain the objective.²⁸

In this case, Germany could claim that the condition laid down in the *Baukindergeld* scheme is justified by the general interest of achieving an adequate supply of real estate through promoting the construction of houses in its territory. This condition does, at any rate, go beyond what is necessary to achieve the desired goal nevertheless. The goal, i.e. meeting the demand for housing, could be achieved equally effectively if resident taxpayers in Germany subject to German law chose to reside in the territory of another Member State, rather than in Germany.²⁹ The above shows that the *Baukindergeld* scheme imposes an illegal restriction. Pursuant to Article 21 TFEU, this conclusion also applies to economically non-active persons residing in Germany who are resident income taxpayers in Germany subject to German law, for the same reasons.

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

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

In a number of rulings, the Court of Justice has already expressed its opinion about tax schemes in which Member States only provide incentive for domestic activities or objects. In most cases, however, the purpose *behind* these schemes went beyond the purely national. In its ruling on the German home ownership benefit, the Court states that the objective to meet the demand for housing might be achieved equally well by promoting the acquisition of foreign owner-occupied dwellings.³⁰

As regards social benefits, the Court of Justice ruled that the right to equal treatment, particularly in the field of social benefits, is an important factor in integration in the host state.³¹

3.3.1 Cross-border workers in *Schumacker* situations

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

²⁸ See particularly ECJ 26 October 2006, cited above, C-34 5/05, *Commission v Portugal*, ECR 2006, I-10633, point 24.

²⁹ In this context, see ECJ Ruling 26 October 2006, C-345/05, *Commission v Portugal*, ECR 2006, I-10633 point 35.

³⁰ ECJ 17 January 2008, C-152/05, *Commission v Germany*, ECR 2008, I-39, point 28.

³¹ ECJ 30 April 1996, C-308/93, ECR 1996, I-12097 See I. Van der Steen, 'Gelijke behandeling gezinsleden migrerende werknemers', *NTFR* 1996, 173-176.

Most cross-border workers in Germany find themselves in a 'Schumacker situation'.³² Most people who are resident taxpayers in Germany under German law but live outside Germany earn almost their entire family income in Germany (90%) and must therefore be treated the same as residents of Germany as regards personal and family benefits. If financial compensation is denied to persons who live outside Germany but are resident taxpayers there, this constitutes indirect discrimination and thus a conflict with EU law.³³ EU law, after all, grants migrant cross-border workers the same treatment as comparable workers in the host country, creating a Schumacker situation. Germany must therefore also grant *Baukindergeld* to cross-border workers who earn more than 90% of their incomes under German tax law, which constitutes unlimited tax liability in Germany, for the purchase or construction of private dwellings outside German territory. On the other hand, EU law also states that it is important whether or not the state of residence can take into account the personal and family circumstances of the taxpayer.³⁴ The state of residence may be unable to do so due to a lack of sufficient taxable income there. If Germany, as the state of work, is able to take these circumstances into account, however, because the person concerned has sufficient income there, Germany will have to grant the benefit even if the 90% income threshold is not met.

3.3.2 Cross-border workers in non-Schumacker situations

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

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

The *Baukindergeld* is the successor of the *Eigenheimzulage* in Germany³⁵, a home ownership benefit for families that existed between 1995 and 2005. This benefit was awarded to families with children who wanted to acquire property and amounted to about EUR 800 per year per child. This tax-free benefit scheme was abolished in 2005.³⁶ Resident taxpayers in Germany under German law who acquired a property in Germany were eligible for the *Eigenheimzulage*.³⁷ Germany refused to pay the *Eigenheimzulage* to cross-border workers who worked in Germany however. The *Eigenheimzulage* was abolished after the European Parliament asked the European Commission in 2003 whether the

³² Among other rulings: ECJ 14 Februari 1995, C-279/93, *Schumacker*, ECR. 1995, I-225 See also H. Niesten, *Belastingvoordelen van de grensoverschrijdende EU-persoon. Een onderzoek naar de behoefte aan en de mogelijkheden van het minimaliseren van fiscale belemmeringen van het vrije personenverkeer in de Europese interne markt*, diss. Hasselt and Maastricht, 2017

³³ Among other things, the freedom of movement for workers in Art. 18 and 45 TFEU; the freedom of establishment for self-employed persons in art. 49 TFEU.

³⁴ See ECJ 9 februari 2017, C-283/15, X, ECLI:EU:C:2017:102, point 42.

³⁵ The *Eigenheimzulage* was set out in Section 2(1), first sentence, *Eigenheimzulagengesetz* (German law on the private home ownership benefit), version of 1997, as amended by the 2004 *Haushaltsbegleitgesetz* (the accompanying Budget Act of 2004)

³⁶ *Gesetz zur Abschaffung der Eigenheimzulage* of 22 December 2005 (law repealing the private home ownership benefit), *BGBI.* 2005 I, p. 76.

³⁷ Section 1 of the *Einkommensteuergesetz* (Income Tax Act), in the *BGBI* version. 2002 I, p. 4210 (hereafter: "EStG").

refusal of Germany to pay the *Eigenheimzulage* to cross-border workers was contrary to EU law.³⁸ Then-acting European Commissioner Bolkestein was of the opinion that a cross-border worker who was subject to German tax without limitation was entitled to the German *Eigenheimzulage*.³⁹ The Court of Justice ruled against the German government in an infringement action launched by the European Commission in 2008.⁴⁰ Cross-border workers who had applied received the *Eigenheimzulage* after all with retroactive effect.

It is further important to note that, in *its Lakebrink* ruling, the Court of Justice ruled that it constitutes a breach of the freedom of movement for workers not to take into account the negative income of (rented) property situated in another Member State (in this case Germany) for the purposes of the determination of the tax rate applicable to his Luxembourg income.⁴¹ It follows from the *Renneberg* ruling that a fictional domestic taxpayer must be allowed under EU law to deduct his or her negative income from his or her own home in Belgium from his or her Dutch labour income.⁴²

4 Potential solutions

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

The *Baukindergeld* must not be restricted to property owners in Germany. Cross-border workers who live outside and work in Germany are also entitled to the benefit. The regulations on the free movement of persons and European citizenship do not allow for any distinction according to place of residence.⁴³

4.2 Cross-border impact assessment

The author recommends that a coherent analysis of the expected impact of the new legislation on cross-border workers be incorporated in the parliamentary scrutiny of new legislation, possibly as a separate section of the Explanatory Memorandum. Such analyses of cross-border effects as have taken place so far have not been implemented coherently, i.e. have used different research methods. The cross-border impact of new legislation on cross-border workers and border regions is generally still not being adequately examined, i.e. border effects are still being underestimated by national legislators.⁴⁴

³⁸ Written question E-3846/02 to the Commission by Ieke van den Burg (PSE) and Wilfried Kuckelkorn (PSE). See: J. Feijen, 'Bolkestein: Duitsland moet Eigenheimzulage verlenen aan grensarbeiders', *NTFR* 2003, episode 16, p. 679.

³⁹ <http://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX%3A92002E003846>

⁴⁰ ECJ 17 January 2008, C-15 2/05, *Commission v Germany*, ECR 2008, I-39, V-N 2008/10.6.

⁴¹ ECJ 18 July 2007, C-182/06, *Lakebrink*, ECR 2007, I-6705.

⁴² ECJ 16 October 2008, C-527/06, *Renneberg*, ECR 2008, I-7735, ECR 2008, I-7735

⁴³ ECJ 17 January 2008, C-152/05, *Commission v Germany*, ECR 2008, I-39.

⁴⁴ On the positive side, however, two studies on the position of cross-border workers were published in 2017:

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

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

5 Conclusion *Baukindergeld*

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



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