DOI 10.53252/BS2134

b-solutions

Annex I.a: FINAL REPORT BY THE EXPERT[1]

Part of the report is also the information sheet on the advice case to be compiled by the advised entity to be submitted to the Association of European Border Regions (AEBR) attached to the report.

Advice case title:

Corona Pandemic and Home Office – Consequences for the social security and taxation of cross-border workers

Full official name of the advised entity:

Grenzinfopunkt Aachen-Eurode

Name of the expert contracted for the advice case:

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Date: 14 July 2021

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[1] AEBR and the European Commission have the right to utilise the information submitted, as well as to publish its content and to include it in derivative works.

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I. Description of the obstacle

Working from home has increased enormously during the COVID-19 crisis.[2] This also applies to frontier workers. It is expected that this increase in working from home will also continue after the crisis.[3] One reason is, that a large number of employees would like to work more often at home even after the crisis. In addition, many employers also aspire to working at home and adjust their policies accordingly. However, working (partly) from home has consequences for the regulation of cross-border workers. The workplace is transferred from the State of employment to the State of residence. This relocation has consequences for, among others, the tax liability, the insurance obligation and the build-up of the pension. These consequences can lead to complications for cross-border workers and their employers. Hence, the central question is whether the current applicable regulations will hinder the free movement of workers after the crisis.

The central question of this report can be divided into a number of sub-questions:

1. Are the temporary measures with respect to working from home (i.e. exemptions) that were taken by national governments only applicable in the case that the frontier workers were already carrying out cross-border work before the crisis or also if a person starts working as a frontier worker during the crisis?

2. Are the temporary measures an effective instrument to guarantee the rights of frontier workers in the future?

3. Can the procedure of Article 16 of Regulation No 883/2004 (coordination of social security) be used as a legal and practical instrument for the new circumstances? It should be taken into account that competent authorities do not always have a uniform position.

4. Is the 25% criterion referred to in Article 14(8) of Regulation No 987/2009 sufficient to justify the attribution of the insurance obligation to the State of residence in the case of working from home, or should the percentage be adjusted? Or should working in the home office be redefined in the light of social security coordination?

5. The current tax treaties do not provide for working from home. The question arises whether working from home should be further defined? Could the developed 'tax' definition then be brought in line with Regulation No 883/2004?

It should be noted here that for the follow-up to cross-border work from home, it is important what exactly is meant. The terms 'working from home' and 'teleworking' are currently used

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[2] During the crisis, around 40% of paid hours worked by employees were performed from home in the European Union. Report Living, working and COVID-19, Eurofound 2020, p. 59. In the Netherlands, according to TNO, in March 2021, 49% of employees were working wholly or partly from home. See: www.monitorarbeid.tno.nl/nl-nl/coronacrisis/nea-covid-19/, consulted on 1 July 2021: Letter Minister of Social Affairs and Employment, 30 April 2021, No 2021-0000072040, p. 2.

See also Verbreitung und Auswirkungen von mobiler Arbeit und Homeoffice, Bundesministerium für Arbeit und Soziales, Forschungsbericht 549, October 2020.

[3] See for instance in Belgium, where working from home has become an important job criterion. Commission for Social Affairs, Employment and Pensions, 22 June 2021.

See also Report Living, working and COVID-19, Eurofound April 2021, p. 3: 73% of the employees wants to continue working from home to a certain extent.

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interchangeably. Should 'working from home' also be understood as 'teleworking'? The latter is the case when an employer recruits employees from abroad and they work for the employer from abroad in their State of residence, for example, via the server. In this case, no cross-border work takes place. The employee lives and works in the same State. This could lead to possible abuse by allowing employers to choose countries with a low contribution rate, thus reducing the employer's costs. This form of teleworking should not be understood as working from home. Nor, in our opinion, does 'working from home' include the employee who normally works in two countries for two different employers. For this, Article 13 of Regulation No 883/2004 provides solutions. However, in the following, we assume the situation in which an employee from Member State A works in his State of residence wholly or partly for a single employer established in Member State B.

This leads to the first recommendation: it must be made clear what is meant by working from home.

II. Indication of the legislation/administrative dispositions causing the obstacle

II.1. Legislation applicable during the COVID-19 crisis

The Euroregion Meuse-Rhine under discussion concerns Belgium, the Netherlands and Germany. Both Belgium[4], the Netherlands and Germany[5] have taken various measures for both employees and the self-employed to cope with the COVID-19 crisis. In this analysis, the focus is on the consequences of those measures that were developed for cross-border employees. Although cross-border self-employed also face problems, they are beyond the scope of this report.[6]

During the crisis, the following measures have been taken with regard to cross-border workers. A distinction can be made between tax and insurance obligations.

a. Tax liability

With regard to taxation, the Member States concerned have taken measures to exempt frontier workers from “normally existing rules”. The forced working from home of the frontier worker has no tax consequences during the crisis. It should be noted that the frontier worker can choose whether the exemptions apply to him or the applicable bilateral tax treaty. In other words, the income can be taxed on the basis of the situation without forced work from home or on the basis of the actual days worked in the State of residence and employment. This follows OECD recommendations, that agreements be made at the time of the crisis on how to deal with the allocation rules of tax treaties. In those agreements, the days working from home should not be allocated to the State of residence, so that taxation remains allocated to the State of work. However, States may choose a different

[4] Belgium has also concluded agreements with other neighbouring countries, France and Luxembourg.

[5] Germany has also concluded agreements with other neighbouring countries, France and Luxembourg.

[6] See for example the issue of the TOZO. Self-employed persons residing abroad and working in the Netherlands are not eligible for income support.

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treatment. It is also recommended that employers and employees keep records of attendance in the State of residence or a third State.[7]

The following agreements have been concluded:

a) Netherlands-Germany (6 April 2020), the measure will apply from 11 March 2020 and will be valid until 30 September 2021.
b) Netherlands-Belgium (30 April 2020), the measure is valid from 11 March 2020 until 30 September 2021.
c) Belgium-Germany, the measure is valid from 6 May 2020, until 30 September 2021.[8]

In normal times, according to the tax treaties between Netherlands-Belgium, Netherlands-Germany and Belgium-Germany, the power to levy tax on the frontier worker's days working from home would be allocated to the State of residence pursuant to Article 15 of the Netherlands-Belgium Convention, Article 14 of the Netherlands-Germany Convention and Article 15 of the Belgium-Germany Convention, respectively. The provisions on non-self-employed work in the relevant treaties are largely based on Article 15 of the OECD Model Convention. In the following, Article 15 of the OECD Model Convention will be taken as the point of departure. Normally, under Article 15(1) OECD Model Convention, tax on income earned in the State of residence would be allocated to the State of residence, unless the employment is carried out in the other State. The right of taxation reverts to the State of residence if, pursuant to Article 15(2) of the OECD Model Convention, three conditions are cumulatively met:

a) the employee spends less than 183 days in the work State in any period of twelve months commencing or ending in the fiscal year concerned; and,
b) the remuneration is not paid by or on behalf of an employer in the State of the employer; and
c) the remuneration is not borne by a permanent establishment in the State of employment.

Here, it should also be noted that the Belgium-Germany treaty speaks of a 'calendar year' instead of 'a twelve month period'. Moreover, this treaty has a frontier worker protocol. According to this protocol, the income of a frontier worker who lives in a frontier zone and works in the other State and returns daily to the State of residence is taxed in the State of residence.[9]

The exemptions agreements on taxes concluded by the Member States generally have a similar structure, such as specifying when the agreement will end. The agreements may also be terminated unilaterally. At present, the agreements of the Netherlands with Belgium and Germany are valid until

[7] OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis, 3 April 2020 and Updated guidance on tax treaties and the impact of COVID-19 pandemic, 21 January 2021, paragraph 56. Government grants should be taxed in the original State of employment. Updated guidance on tax treaties and the impact of COVID-19 pandemic, 21 January 2021, paragraph 52.

[8] See https://eservices.minfin.fgov.be/myminfin-web/pages/fisconet/document/b1e96919-aca9-45ce-9194-a40202d82bf8, consulted on 9 July 2021.

[9] Article 11 Final Protocol Belgium-Germany Treaty: "The border area of each Contracting State shall be defined on either side of the common border of the two States by an imaginary line drawn at a distance of twenty kilometres from the border, it being understood that the municipalities intersected by this imaginary line shall be included in the border area.

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30 September 2021.[10] This creates a new problem. The tax measure runs until 1 October, while, as will be shown, the social security measure runs until 1 January 2022.[11] This means that, without additional extensions or agreements, after 30 September 2021 the frontier worker and his employer will have to deal with the 'normal' operation of Article 15 of the OECD Model Convention, while the social security remains in the State of employment. This will create an additional administrative burden for both the employer and the employee for three months of this calendar year. This leads to the second recommendation: in order to prevent an increase of the administrative burden, the exemptions should equally continue until 1 January 2022.

With regard to the relationship between the Netherlands and Germany, it should also be noted that frontier workers residing in the Netherlands who receive benefits such as *Kurzarbeitergeld*, *Insolvenzgeld*, and *Arbeitslosengeld* from Germany are not taxed for these benefits in the State of residence in the Netherlands.[12] Normally, pursuant to Article 17 of the Netherlands-Germany tax treaty[13], these payments, if they are less than € 15,000 per calendar year, should be taxed in the Netherlands. However, under two conditions, namely, firstly, that the taxpayer for the first time claims Kurzarbeitergeld, Insolvenzgeld or Arbeitslosengeld on or after 11 March 2020 and, secondly, that the taxpayer can submit the data substantiating the first condition, these payments will be exempt. However, the benefits will be included in the Dutch tax base.[14]

With regard to an unemployment benefit paid from Belgium, it still applies that this is taxed in the State where the salary was also taxed.

b. Insurance obligation

As a result of frontier workers being forced to work from home, the insurance obligation would normally shift from the State of employment to the State of residence, according to the applicable legislation. The frontier worker performs work in two or more Member States, as a result of which Article 13(1)(a) of Regulation No 883/2004 in conjunction with Article 14(8) of Regulation No 987/2009 must be applied. This has the consequence that in case more than 25% of the working time and/or salary is spent or obtained in the State of residence, the legislation of the State of residence becomes the applicable legislation.

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[10] See Agreement between the competent authorities of the Netherlands and Belgium extending the Agreement concerning the situation of frontier workers in the context of the COVID-19 health crisis of 30 April 2020, as extended by the agreements of 19 May 2020, 19 June 2020, 24 August 2020, 7 December 2020 and 5 March 2021, Stcrt. (Government Gazette) 2021, 34005 and Agreement between the competent authorities of Germany and the Netherlands concerning the extension of the Agreement of 6 April 2020 on the application and interpretation of Article 14 of the Tax Convention between the Netherlands and Germany and on a temporary exemption from some German social security benefits, Stcrt. 2021, 34076.

[11] Belgium: COVID-19 pandemic and applicable legislation - update (fgov.be), consulted on 1 July 2021. Netherlands: Voorlopig geen gevolgen voor grenswerkers die thuis werken door coronaaatregelen | BBZ-BDZ | SVB, consulted on 7 July 2021.

[12] See Decree on emergency measures for the corona crisis, Government Gazette 2021, 11856.

[13] See also the amendment protocol of 24 March 2021 on Krankengeld and Elterngeld. In all cases, the State that provides the benefits may levy these taxes. This means that a Dutch resident who receives such a German benefit is not taxed in the Netherlands for these benefits.

[14] See Decree on emergency measures for the corona crisis, Stcrt. 2021, 11856, point 10.

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Pursuant to Article 14(5) of Regulation No 987/2009, a 'person who 'normally pursues an activity as an employed person in two or more Member States' [means] a person (…) who simultaneously, or in alternation, carries out one or more separate activities in two or more Member States for the same undertaking or employer or for various undertakings or employers'.[15]

As far as the obligation of insurance is concerned, the EU Administrative Commission has advised to ignore the consequences of working from home. The forced working from home due to the crisis is seen as a *force majeure*.[16] This concerns the situation of frontier workers who normally only work for an employer in the State of employment and the situation of an employee who works in two or more Member States and is forced to work more from home because of the crisis. Belgium, Germany and the Netherlands have followed that advice and unilaterally chosen to neutralise the homeworking days for the applicable rules here as well.

In the Netherlands, the applicable rules do change if a frontier worker:

a) did not have an employer, but starts working for an employer in another Member State, or
b) had an employer, but changes to a new employer established in another Member State.[17]

This answers the first sub question concerning the Netherlands and the application of Regulation No 883/2004.

II.2. Possible problems with working from home after the COVID-19 crisis

If the normal rules of the tax treaty and Regulation No 883/2004 and Regulation No 987/2009 are applied, the following picture emerges in diagram form[18]:

Working from home	**Taxation**	**Contribution**
100%	State of residence	State of residence
4 days per week working from home, 1 day in the work state	Work State/residence	State of residence
4 days per week in the work state, 1 day working from home	Work State/residence	Work State

[15] Practical guide to the applicable legislation in the European Union (EU), the European Economic Area (EEA) and Switzerland, 2013, p. 26.

[16] Administrative Commission AC 075/20, The application of Title II of Regulation (EC) No 883/2004 and Articles 67 & 70 of Regulation (EC) No 987/2009 during the Covid-19 pandemic, 15 May 2020.

[17] Coronavirus and living or working across the border: social insurance does not change in principle (svb.nl), consulted on 1 July 2021.

[18] Frontier workers in Europe, A study of tax, social insurance and pension aspects of working across borders, Geschriften van de Vereniging voor Belastingwetenschap, No 257, 2017, p. 196.

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The answer to the second sub-question, whether the temporary measures are an effective instrument to guarantee the rights of frontier workers in the future, is that this is not possible given the current tax treaties and the Regulation No 883/2004. These regulations would have to be amended to allow frontier workers to work from home with the same effects as before the crisis.

Assuming that working from home will be a frequent occurrence, and the pre-crisis rules are applicable again, the question arises what problems the application of those rules will cause. In a numerical example, the effects of the current rules have been applied if the cross-border worker were to work from home. This does not refer to the corona measures, but to the double tax treaty and Regulation No 883/2004. The example concerns a single person with an average income of € 36,500 working at just one employer. A comparison can be made between the Belgian, German border workers working in the Netherlands and the Dutch border workers working in Germany or in Belgium on the one hand and the neighbour of the Belgian, German and Dutch border workers on the other hand. The latter lives and works in the same State. A distinction can be made between the situation where the frontier worker works 100% in the State of employment and the situation where the frontier worker works 40% in the State of residence and 60% in the State of employment.

What is noticeable is that the wage costs of a Dutch employer that have to be incurred for a Belgian or German frontier worker who works from home, increase, while in the opposite situation the wage costs decrease. The net wage of the cross-border worker who works 40% from home increases in almost all cases, except for the situation of a German cross-border worker who works (from home) for a Dutch employer. This one has a reduction of the net wage of € 1,157. The biggest increase is for the Dutch cross-border worker working for a German employer (from home), namely € 3,566.

A comparison with the neighbour of the cross-border worker who works from home shows that the latter earns more in all cases, which is not the case when the cross-border worker works 100% in the country of employment. In Appendix A, an overview of the calculations is provided.

Next to these financial consequences, more problems can arise, of which a description is given below. However, it should be noted that working from home also has some advantages, such as reducing CO_2 emissions, the number of traffic jams, and reducing the stress of travel time.[19]

Increased administrative burden

A shift of taxing rights from the State of work to the State of residence results, among other things, in an increased administrative burden for both the employee and the employer. A salary split takes place if a frontier worker works partly in his State of residence and partly in his State of work. With a salary split, part of the salary is taxed in the State of residence and part in the State of work. This can lead to a progression advantage.

[19] See inter alia M. Samek Lodovici et al, The impact of teleworking and digital work on workers and society, Publication for the committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2021; Eurofound, Report Living, working and COVID-19, Eurofound, Living and working in Europe 2020, Publications Office of the European Union, Luxembourg, 2021.

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When developing a home-working policy, it is important to avoid employers refraining from hiring frontier workers because of administrative burdens or higher costs. This would not benefit the free movement of workers and the idea of an integrated cross-border labor market.

Loss of tax relief in the State of employment

Another important consequence would be that the non-resident cross-border worker concerned would no longer be able to benefit from the tax facilities applicable to resident taxpayers in the State of his employment. Both Germany[20] and the Netherlands[21] apply a 90% criterion, Belgium a 75% criterion. This criterion determines how much of the taxable income must be taxable in a certain country in order to have access to tax facilities and benefits. By working from home and taxing the salary in the country of residence, it can happen that one no longer meets the criterion and thus loses certain tax facilities. On the other hand, the frontier worker can in that case take advantage of the tax facilities in his State of residence. It should be noted here that the European Court of Justice ruled that it is first and foremost up to the State of residence to take account of the border worker's loss of financial resources.[22]

Tax and contribution mismatch

If the right to tax is (partly) attributed to Member State A and the obligation to insure or the levying of contributions to Member State B, the State of residence of the worker, a mismatch occurs between taxation and contributions. If the premium burden in the State of residence is higher than in the State of employment, this leads to a higher financial burden for the employer. In addition, the employer also has a higher administrative burden, because he has to register with the foreign social security authorities. It should be noted that a different social security system does not in itself have to result in disadvantages for the employee.

Disconnection of non-statutory social security

By allocating the insurance obligation to the State of residence, the so-called non-statutory social security is disconnected. By non-statutory social security, we mean the employment conditions laid down in collective agreements. It should also be taken into consideration that the trend towards privatisation also casts a shadow on non-statutory social security. One example is the privatisation of the Dutch Sickness Benefits Act; the 'gaps' are often resolved in collective agreements.[23] As regards taxation, contributions and non-statutory social security, the following example can be given in diagram form of a cross-border worker living in Germany who works for a Dutch employer.

[20] Article 1a Einkommensteuergesetz.

[21] Article 7.8 IB 2001 Act.

[22] See for example Case C-279/93 *Schumacker*, EU:C:1995:31.

[23] Frontier workers in Europe, An examination of tax, social insurance and pension aspects of cross-border working, Geschriften van de Vereniging voor Belastingwetenschap, No 257, 2017, p. 197.

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Employee living in Germany working for a company based in the Netherlands				
Working in:		Contribution levied in:		Taxes in:
Germany	Netherlands	statuatory	Non-statuatory	Splitting?
0%	100%	Netherlands	Netherlands	100% Netherlands
10%	90%	Netherlands	Netherlands	90% Netherlands & 10% Germany
50%	50%	Germany	Netherlands	50% Netherlands & 50% Germany

The problem arises because in a cross-border situation, the labor law of country X (in this case, the Netherlands) applies, while the social security law of country Y (in this case, Germany) applies. That difference applies in particular in relation to the Dutch obligation to continue to pay wages for two years in the event of illness.[24] This duration is, in contrast to what applies in Belgium and Germany, extremely long. In Germany, the employer is obliged to continue to pay wages for six weeks, while in Belgium, in principle, a period of one month applies.[25] Suppose a Dutch cross-border worker works three days a week in Germany and two days a week in the Netherlands. German employment law has been declared applicable. Pursuant to Article 13(1)(a) of Regulation No 883/2004 in conjunction with Article 14(8) of Regulation No 987/2009, Dutch social security law is the appropriate law. As soon as the period of the obligation to continue to pay wages has expired under German law, the Netherlands UWV refuses to pay sickness benefit.[26] This is based on the Dutch term. This problem already existed before the COVID-19 crisis. The question is whether the Dutch obligation to continue to pay wages can be imposed on a foreign employer, despite the fact that Dutch labor law is not applicable. One may refer in this respect to the Paletta I and Paletta II judgments.[27] It is often held that the German employer has an obligation to continue to pay wages for 104 weeks. In addition, it is difficult for foreign employers to take out insurance in the Netherlands to cover the continued payment of wages obligation.[28] This problem becomes all the more pressing if working from home becomes the new normal. Clarity will have to be obtained on this issue. One possible consequence could be that German and Belgian employers will think twice before employing a Dutch cross-border worker, and that would not be conducive to cross-border employment in the Euroregion Meuse-Rhine. This brings us to the third recommendation: an investigation should be conducted into the

[24] Article 7:629 BW.

[25] See Heike Xhonneux, Wage payment during illness in cross-border perspective, Grensoverschrijdend werken, Vakblad over werken en wonen over de grens 2019, No 22.

[26] Heike Xhonneux, ibid., p. 12.

[27] Case C-45/90, Paletta I, ECLI:EU:C:1992:236 and Case C-2206/94, Paletta II, ECLI:EU:C:1996:182.

[28] See Written answer to questions by Omtzigt (CDA) by State Secretary of Social Affairs and Employment during the AO Grensarbeid of 26 September 2019 on coordination of social security systems 20 December 2018 on 14 January 2019 reference 2018-000081469, https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2019A00789. Heike Xhonneux, ibid., p. 14.

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interpretation of the Paletta I and Paletta II judgements concerning the applicability of social security law when the labor law of another Member State is applicable.

Health insurance

The next problem concerns health insurance. The frontier worker is normally insured for his health care costs in the State of employment. He or she can also receive care in the State of residence. This is done by means of an S1 form. With that form, the frontier worker can register with the insurer in the State of residence. This often involves administrative costs. If the care is used in the State of residence, it is reimbursed based on the conditions of the State of work. With an S1 form, there is also an entitlement to care according to the rules of the State of residence.

When working full-time in the Netherlands, the cross-border worker is insured in the Netherlands and must report to a Dutch health insurer. If the frontier worker is insured in his State of residence, for instance because he spends 25% or more of his working hours in the State of residence, he must take out insurance in the State of residence.[29] Switching care can lead to (administrative) problems. The question arises whether the employee can easily switch health insurance.

A possible problem could be that the care in the State of employment has always been used, when the employee has to switch to care in the State of residence. Especially in the case of chronically ill people, the switch can have far-reaching consequences. In addition, the language can lead to problems.

Tax: Permanent establishment

Another potential problem concerns the creation of a permanent establishment (PE) for the employer in case an employee works from home. Some companies were concerned during the crisis that working from home would constitute a PE. If there is a particular PE in the source State, that State may tax the income attributed to the PE under Article 7 of the OECD Model Convention. The definition of a PE is set out in Article 5 of the OECD Model Convention. The OECD noted that the COVID-19 situation is unlikely to cause changes to a PE provision. The exceptional and temporary change in the location of employees' employment due to the COVID-19 crisis, such as working from home, should not create new PEs for the employer. A construction site PE will not cease to exist when work is temporarily interrupted.[30]

The OECD notes that, in general, for a PE to be considered 'a fixed place of business through which the business of that undertaking is wholly or partly carried on', it must have some degree of permanence and be at the disposal of an undertaking. And that is not the case because of COVID-19. Individuals who stay at home to work remotely usually do so as a result of government directives: it is force majeure and not a requirement of an enterprise. Given the extraordinary nature of the COVID-19 crisis, and to the extent that it does not become the new norm over time, teleworking

[29] See Zorgverzekering | Zorg | Wonen in België, werken in Nederland | Grensinfopunt, consulted on 6 July 2021.

[30] Updated guidance on tax treaties and the impact of COVID-19 pandemic, 21 January 2021, paragraph 19 and 27.

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from home (i.e. the home office) would not create a PE for the company/employer, not even because such activity lacks a sufficient degree of permanence or continuity or because the company, except through that one employee, has no access or control over the home office. In addition, the employer provides an office (in the State of work), which in normal circumstances is at the disposal of the employees. The OECD stressed that this only applies 'to the extent that it does not become the new norm over time'. Pursuant to paragraphs 18 and 19 of the Commentary on Article 5 of the OECD Model Convention, whether or not the employee is required to work from home is an important factor in determining whether there is a PE. In case a home office is used on a permanent basis and it is clear that the employee is obliged to work from home, the home office can be considered as a PE.[31] This in turn could lead to e.g. a liability to payroll tax for the employer in the State where the employee lives and works.[32]

II.3. Working from home after the crisis

Description of employers' policies

A number of employers have formulated or are in the process of formulating a home working policy. A number of policy plans promote home working, but a cross-border worker may not work more than 25% of his/her time at home in his/her State of residence. This restriction is aimed at the rule laid down in the implementing regulation No 987/2009 that, if 25% or more of the working time and/or salary is spent in the State of residence, the insurance obligation shifts from the State of work to the State of residence.[33] One plausible possibility that arises is that employers in the future will oblige frontier workers to work in the State of employment and that they cannot benefit from the new working at home policy, arguing that the situation of frontier workers residing abroad is not comparable to that of employees residing and working in the Netherlands because of the tax, social security and labor law implications.

III. Description of a possible solution

III.1. New initiatives

Meanwhile, new Member State initiatives are being developed to formalise working from home.[34] For example, a proposal for a law has been submitted in the Netherlands. On 21 January 2021, the proposal entitled 'Work where you want' was submitted by Members of Parliament Van Weijenberg

[31] Updated guidance on tax treaties and the impact of COVID-19 pandemic, 21 January 2021, paragraph 18.

[32] See article 6(2), Law on income tax 1964.

[33] See article 14(8), Regulation No 987/2009. The criterion should be determined taking into account the twelve coming months. See Article 14, paragraph 10, Regulation No 987/2009.

[34] The SER has also made recommendations to facilitate working from home. Opinion Mobility and the Corona Crisis | SER. Koolmees asked the SER to also consider the situation of frontier workers. Letter from the Minister of Social Affairs and Employment, 30 March 2021, No 2021-0000057245. See also the intention of the Minister of Social Affairs and Employment to develop a long-term vision on cross-border workers and homeworking together with the State Secretary of Finance. See report of committee debate, Standing Committee on Social Affairs and Employment and Standing Committee on European Affairs, 29 June 2021, 21 501-31, No 620.

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(D66) and Smeulders[35] (GroenLinks). According to the draft, an employee has the right to work from home, in principle. The employee can submit a request to determine the place of work, in the same way as this is already possible with regard to working hours or working time.[36] The existing Flexible Work Act would need to be amended in this regard. In the internet consultation, attention was asked for frontier workers. Also the Council of State (Raad van State) has also commented on this. This should be regulated by adjusting the bilateral agreements with Germany and Belgium, which would lead to a relaxation of the premium and tax obligations. The initiators of the proposed law reacted as follows: This would allow frontier workers to continue working at home even after the corona crisis. The initiators have much sympathy for this aspect, but also note that this cannot be regulated in the present piece of legislation. For this reason, the initiators express their intention to call on the government to enter into talks with the aforementioned countries in order to relax the rules on tax and premium obligations.[37] The Council of State notes the following in this regard: 'However, in this context, the question must be answered as to how it is ensured that the employee is sufficiently aware of such possible consequences and furthermore what the consequences are for the employer. Here too, the question is in what cases the employer can justifiably refuse a request to work from home because of these consequences. If it is not clear whether these consequences can be serious reasons for rejecting a request, this leads to legal uncertainty for both the employer and the employee. Proper preparation of a legislative amendment requires that such problems, too, are first adequately answered'.

Hence, these questions must first be clarified before the proposed law can be finalised.[38] The Council of State's report mentions a comment made by the 'Stichting Geen Grens' as to whether the current policy on frontier workers could be continued and what this could mean for new employment. In addition, the question is whether the proposed law should be limited to the neighbouring countries.[39] Recent parliamentary documents show that the initiators limit themselves to an appeal to the Cabinet regarding bilateral tax agreements, as they are not negotiating partners. For direct neighbouring countries, the initiators give priority to the temporary measure taken with regard to social security.[40]

An important question raised by the legislative proposal is whether a distinction may be made between employees resident in the Netherlands and non-resident employees, the frontier workers. If it becomes a right to work from home, the question arises whether this right is a social benefit within the meaning of Article 7(2) of Regulation No 492/2011.[41] Social advantages can be defined as follows: "All 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, and the extension of which to workers who are nationals of other Member States

[35] Smeulders has now been replaced by Maatoug (GroenLinks).

[36] Proposal of law by members Van Weyenberg and Smeulders to amend the Flexible Work Act in connection with the promotion of flexible work by location (Working Where You Want Act), Parliamentary Papers II 2020/21, 35 714, No 2.

[37] Parliamentary Papers II 2020/21, 35 714, No 3, p. 13.

[38] Advice of the Council of State, Parliamentary Papers II 2020/21, 35 714, No 4, p. 8-9.

[39] Parliamentary Papers II 2020/21, 35 714, No 8, p. 13-14.

[40] Memorandum following the report, Parliamentary Papers II, 35 714, No 9, paragraph 5 and 7.

[41] Regulation (EU) No 492/2011 of 5 April 2011 on freedom of movement for workers within the Union, OJEU No L 2011/141, p. 1.

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seems likely to facilitate their mobility within the Community".[42] Furthermore, the Court of Justice considered: "Article 7(2) of that regulation[43] must be interpreted as meaning that the grant of such a social advantage cannot be made subject to the condition of having resided for a certain period in the territory of a Member State if that condition is not imposed on its own nationals".[44]

The free movement of workers, and the additional non-discrimination provisions, is an important consideration in applying Article 7 of Regulation No 492/2011. In addition, reference can be made to Article 1 of Regulation No 492/2011. Under the terms of the Article, any national of a Member State, irrespective of his place of residence, has the right to take up an activity as an employed person, and to pursue such activity, on the territory of another Member State in accordance with the laws, regulations and administrative provisions governing the employment of nationals of that State. It seems that a frontier worker could claim the right to work from home. This should be clarified.

In Germany, the Federal Ministry of Employment also came with a legislative initiative which promotes and facilitates mobile working.[45] However, the proposal has not yet been debated in Parliament, why it is too late before the Federal elections in September 2021.

In Belgium, during the crisis, an additional administrative act relating to teleworking was imposed. Employers had a registration obligation in this regard. Other aspects that have to be regulated in the with respect to telework after the crisis is currently being discussed in the National Labor Council. The results of the debate are expected in September.[46]

Benelux

The Benelux Union (with the Members NL, BE, LUX) has called upon the governments concerned to, among other things, study and evaluate the problems associated with telework, more specifically for cross-border working in the Benelux, and to draw conclusions from this for the policy to be pursued. In addition, it is called upon to study and implement a harmonised policy with regard to the fiscal and social status of the frontier workers within the Benelux, including the self-employed, the members of the liberal professions, company managers and seconded officials. Special attention should be paid to studying the possibility of bringing the number of permitted days of work outside the State of employment uniformly to 48 for the frontier workers of the three Benelux countries.[47] This means that approximately one day a week would be allowed to work at home. This would avoid the problem of more than 25% working in the State of residence, when the insurance obligation is allocated to the State of residence. The number of 48 seems to be based on the arrangement that exists between Belgium and Luxembourg with regard to frontier workers. In that arrangement, it is allowed to work a maximum of (24 days) outside the State of employment in the State of residence

[42] Case 249/83, *Hoeckx*, ECLI:EU:C:1985:139, paragraph 20.

[43] In the judgment, Regulation No 1612/68 was applicable. In its successor, Article 7 Regulation No 492/2011 is worded in the same way.

[44] Case 249/83, *Hoeckx*, ECLI:EU:C:1985:139, paragraph 25.

[45] See BMAS - Gesetzesinitiative zur mobilen Arbeit, consulted on 1 July 2021.

[46] Committee on Social Affairs, Employment and Pensions, 22 June 2021.

[47] Benelux Inter-Parliamentary Assembly, Recommendations regarding the improvement of the situation of frontier workers in terms of mobility, taxation and social security, in particular by granting a specific status to the remote offices, 23 March 2021, No 920/2.

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or in a third State. The 24 days remain allocated to the State of employment.[48] The current tax treaties do not contain specific clauses for working from home. However, some treaties do contain provisions in case a frontier worker works in his State of residence or in a third State. The question arises as to whether working from home should be further defined. For the coordination of taxation and contributions, as already mentioned it is important that the tax treaties and Regulation No 883/2004 are formulated in the same way.

The fifth sub-question as to whether homeworking should be further defined in the tax treaties and whether the developed 'fiscal' definition should then be brought in line with Regulation No 883/2004 should be answered in the affirmative. The OECD and the Administrative Commission (EU) could work together on this.

Possible working from home tax protocol

The Netherlands is exploring together with Germany whether it is possible to agree on a specific arrangement in the tax treaty for the days frontier workers working from home.[49]

Article 16 No Regulation 883/2004

Article 16 of Regulation No 883/2004 makes it possible, in deviation from the insurance obligation that follows from the allocation rules (Art. 11-15 of Regulation No 883/2004), to allocate the insurance obligation to a Member State other than the Member State that follows from the allocation rules. Article 16 (1) of Regulation No 883/2004 states: “1. Two or more Member States, the competent authorities of these Member States or the bodies designated by these authorities may by common agreement provide for exceptions to Articles 11 to 15 in the interest of certain persons or categories of persons.” It follows from the Practical Guide that the Administrative Commission is of the opinion that, in accordance with Article 16 of Regulation No 883/2004, an exception to the allocation rules may be made in respect of posting, provided that the posting is temporary, that such an exception is in the interest of the worker concerned and that a request has been made in this respect.[50] Both Member States must give their consent if Article 16 of Regulation No 883/2004 is applied. Administrative advantages should not be the only reason for concluding an Article 16 agreement. The interests of the worker or group concerned must be paramount.[51] So-called Article 16 procedures are often used for postings, but they have been used rarely to make an exception for another group of workers.[52] It should be examined whether, for example, a percentage of 40 for

[48] Circular AAFisc No 22/2015 (No Ci.700.520) dated 01.06.2015. In other relations, such as Germany-France and Luxembourg-Germany, similar arrangements also exist, but the number of days is different: 45 days and 19 days respectively.

[49] See https://www.rijksoverheid.nl/actueel/nieuws/2021/03/24/nederland-en-duitsland-wijzigingen-het-belastingverdrag, accessed 30 June 2021.

[50] Practical guide to applicable law in the European Union (EU), the European Economic Area (EEA) and Switzerland, 2013, p. 11.

[51] Practical guide on applicable law in the European Union (EU), the European Economic Area (EEA) and Switzerland, 2013, p. 18.

[52] Overeenkomst krachtens artikel 16, eerste lid, van verordening (EG) 883/2004 betreffende de vaststelling van de op rijnvarenden toepasselijke wetgeving 883/2004, *Stcrt. 2011, 3397*.

assigning the insurance obligation to the State of residence instead of 25% could fall under the 'interest' referred to in Article 16 of Regulation No 883/2004 in the case of working from home. Both the interests of the employee and those of the company must be taken into account. In this respect, the free movement of workers must be taken into consideration. The answer to the third sub-question, whether Article 16 No Regulation 883/2004 could be used as a legal and practical instrument for the new circumstances, is therefore that further research should be carried out into what the 'interest' referred to in Article 16 Regulation No 883/2004 could mean. This should take into account not only the interests of the employee but also those of the employer and in such a way as to ensure the free movement of workers.

With regard to the aforementioned percentage of 25, the question arises whether this will be sufficient to prevent a switch from the insurance obligation if more work is done at home. In the case of a 5-day working week, this means that only slightly more than one day a week may be worked at home. If it is assumed – according to the new initiatives in relation to working more from home - that two days per week will be worked at home, a percentage of 40 would be more reasonable. To the fourth sub-question, whether the 25% criterion mentioned in Article 14(8) of Regulation No 987/2009 is sufficient to justify the allocation of the insurance obligation to the State of residence in the case of working from home, or whether the percentage should be adjusted, the answer is that, in all probability, the percentage of 25 will not be sufficient to prevent the consequences of the desired intention to work from home.[53] Working from home would have to be redefined in the light of the coordination of social security.

In addition to Article 16 Regulation No 883/2004, it should also be examined whether Article 8(2) Regulation No 883/2004 could play a role. Article 8(2) of Regulation No 883/2004 states: '2. Two or more Member States may, as the need arises, conclude conventions with each other based on the principles of this Regulation and in keeping with the spirit thereof.'[54]

In the current Regulation, the 25% criterion is decisive for determining the applicable legislation of the State of residence. An amendment to the Regulation must be decided according to the ordinary procedure with Member States and European Parliament as co-legislators. The current proposal COM(2016)0815 to amend Regulation No 883/2004 does not include such an amendment.[55] It is very unlikely that it could still play a role in the ongoing decision making process. Under Article 8 of Regulation 883/2004, two or more Member States may, if necessary, conclude conventions with one another based on the principles of the Regulation and in keeping with its spirit. It should be examined whether the countries of the Euroregion Meuse-Rhine (DE, NL, BE) in question could conclude an agreement based on Article 8(2) of Regulation No 883/2004 to set, for example, a higher percentage than 25.

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[53] In this respect, we can refer to the first results from surveys and studies, which show a significant difference between working at home before COVID-19 and the wish to continue working at home, often in part, after COVID-19. See also Eurofound, 2021, ibid.,

[54] See also Article 8(2) Regulation No 987/2009: 'Member States may conclude between themselves, if necessary, arrangements pertaining to the application of the conventions referred to in Article 8(2) of the basic Regulation provided that these arrangements do not adversely affect the rights and obligations of the persons concerned and are included in Annex 1 to the implementing Regulation.

[55] https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-labour/file-jd-revision-of-regulation-on-social-security-labour-mobility-package

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III.2. Recommendations

In conclusion, when developing new rules on working from home for frontier workers who work for one employer, a careful balancing of interests should be carried out. The free movement of workers must be guaranteed. This leads to the following recommendations:

1. Using a uniform definition of working from home

When developing new rules, it must be made clear what is meant by working from home. It concerns situations where there is one employer. This allows a distinction to be made between the concept of working from home on the one hand and “telecommuting” on the other.

2. Synchronisation of social security and tax measures

In order to avoid an increase in the administrative burden due to the Covid crisis, the fiscal measures should continue until 1 January 2022.

3. Concurrence of labor and social security law

Further examination should be made of the interpretation of the Paletta I and Paletta II judgments concerning the applicability of social security law where the labor law of another Member State is applicable. This applies in particular if the periods of the obligation to continue to pay wages vary widely between Member States. The Dutch policymaker must provide clarity on the qualification of the sickness pay continuation obligation. In addition, measures in excess of the statutory provisions (labor law) often provide supplements.

4. Coordination between taxation and contribution

The OECD and the EU Administrative Commission should work together in formulating a structural scheme for working from home.

5. Examination of Article 8(2) and Article 16(1) of Regulation No 883/2004

Consideration should be given to whether Article 8(2) of Regulation No 883/2004 could provide a solution for increasing the percentage of 25 to, for example, 40%. The same can be said with respect to Article 16(1) of Regulation No 883/2004.

IV. Pre-assessment of whether the case could be solved with the European Cross-Border Mechanism

In its Communication from 2017 “Boosting growth and cohesion in EU border regions”, the European Commission proposed different instruments to overcome barriers to cross-border cooperation.[56] In 2018, the Commission has presented a proposal for a “Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context" - the so called European cross-border mechanism

[56] European Commission, Communication “Boosting growth and cohesion in EU border regions", COM(2017) 534 final, p. 14.

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(ECBM).[57] Following earlier initiatives on financial support (INTERREG) and institutional obstacles (the European Grouping for Territorial Cooperation; EGTC) for cross-border cooperation, the next step would be to overcome the legal and administrative obstacles. In preparation for the ECBM, a study has been done to the legal and administrative obstacles in EU border regions.[58] The study categorised the gathered obstacles into three types:

1. *EU-related legal obstacles*: caused by the specific status of an EU-border or by EU legislation (or the implementation thereof), where the EU has exclusive or shared competency;
2. *Member State-related legal obstacles*: caused by different national or regional laws, where the EU has no or only limited competence;
3. *Administrative obstacles*: caused by non-willingness, asymmetric cooperation or lack of horizontal coordination, or by different administrative cultures or languages.

The ECBM intention is: "to allow for the application in one Member State, with regard to a cross-border region, of the legal provisions from another Member State, where the application of the legal provisions of the former would constitute a legal obstacle hampering the implementation of a joint Project".[59] Therefore, the ECBM is aimed at resolving a legal conflict due to different national laws or administrative obligations that are applicable at the same time for the same specific project. Projects in this respect are defined as "any item of infrastructure with an impact in a given cross-border region or any service of general economic interest provided in a given cross-border region".[60]

The current case of working from home in cross-border situations belongs on the one hand to category 1. This is the case with respect to the question which Member State provides social security to a cross-border worker who does work in two or more Member States and what happens when working from home. The European Regulation on the coordination of social security[61] lays down the rules for the coordination between Member States, as is discussed in the report. As concluded the conflict rules of the Regulation *itself* can cause the problem, i.e. changing the social security from the working State towards the State of residence when working from home. Hence, the problem is not a mismatch of two separate national rules, but the nature of the EU rule. In these cases, the ECBM appears to be of no use, as it is concentrated at solutions by providing deviations in national rules.[62] However, as provided under Section III, it is obvious that there is a possibility to find bilaterally or even multilaterally an agreement on deviation from the rule for the benefit for cross-border workers. In fact, this is a political rather than a legal question whether Member States want to make use of the deviation.

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[57] Proposal for a Regulation of the European Parliament and of the on a mechanism to resolve legal and administrative obstacles in a cross-border context COM(2018) 373 final.

[58] J. Pucher, T. Stumm & P. Schneidewind, *Easing legal and administrative obstacles in EU border regions*, Luxembourg: Publications Office of the European Union, 2017

[59] Article 1 of the proposed ECBM.

[60] Article 3(2) of the proposed ECBM.

[61] Regulation No 883/2004 is at the moment under review. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, COM/2016/0815 final.

[62] Via a Commitment or a Statement, Article 1(2) of the proposed ECBM.

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On the other hand is the tax discussion. The same is true for the aspect of taxes with respect to cross-border workers working at home. In this case, there is no EU competence but the tax rules for cross-border workers are the result of bilateral tax treaties between the neighbouring countries (BE-NL, NL-DE, DE-BE). Therefore, the problem falls under category two, since it concerns national rather than EU legislation. Yet, there is no mismatch between different national laws but a potential mismatch between specific details of bilateral tax treaties and the home office reality of cross-border workers. Meaning that also in this case, there is no need for an extra instrument to allow the application of standards of the neighbouring country. Furthermore, changing the national rules via an ECBM would not solve the issue that is at stake. In fact, there is a need for an agreement on amendments or changes to the existing tax treaties, where for instance the 25% rules is embedded. Two Member State of course could agree that cross-border workers are allowed to work 40% at home without a split of their income tax.

With respect to the general situation of cross-border workers that is good news. Neighbouring Member States do not have to wait either for new EU legislation nor for a future ECBM solution. They can find solutions for the home office problem of cross-border workers on the basis of existing legal instrument simply by finding bilateral political agreements.

V. Other aspects relevant to the case

Here, again it can be stressed that there are possibilities for a further exchange of expertise with respect to the Benelux, OECD and the EU's Administrative Commission.

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VI Appendix A
2021 pro forma berekeningen / geheel jaar / single / geen aftrekposten / IB berekeningen / Gemeentelijke belastingen 7% / inclusief heffingskortingen

SV in land WG	Inwoner BE NL werkgever 100% werkzaam in NL	Inwoner BE BE werkgever 100% werkzaam in BE	Inwoner NL BE werkgever 100% werkzaam in BE	Inwoner NL NL werkgever 100% werkzaam in NL
Bruto salaris	€ 36,500	€ 36,500	€ 36,500	€ 36,500
Belasting NL	€ 2,282	€ 0	€ 0	€ 2,282
Belasting BE	€ 332	€ 7,299	€ 7,299	€ 0
Premies*	€ 6,661	€ 4,771	€ 4,771	€ 6,661
Teruggave Compensatieregeling	€ 0	€ 0	€ 0	€ 0
Netto	€ 27,225	€ 24,430	€ 24,430	€ 27,557
Premies WG	€ 6,290	€ 9,125	€ 9,125	€ 6,290
Loonkosten*	€ 42,790	€ 45,625	€ 45,625	€ 42,790

SV in woonland	Inwoner in BE NL werkgever 60% werkzaam in NL, 40% in B	Inwoner BE BE werkgever 100% werkzaam in BE	Inwoner NL BE werkgever 60% werkzaam in BE, 40% in NL	Inwoner NL NL werkgever 100% werkzaam in NL
Bruto salaris	€ 36,500	€ 36,500	€ 36,500	€ 36,500
Belasting NL	€ 77	€ 0	€ 0	€ 2,282
Belasting BE	€ 3,065	€ 7,299	€ 2,212	€ 0
Premies	€ 4,771	€ 4,771	€ 6,661	€ 6,661
Teruggave Compensatieregeling	€ 0	€ 0	€ 0	€ 0
Netto	€ 28,587	€ 24,430	€ 27,627	€ 27,557
Premies WG	€ 9,125	€ 9,125	€ 6,290	€ 6,290
Loonkosten	€ 45,625	€ 45,625	€ 42,790	€ 42,790

*Als NL SV: inclusief nominale bijdrage zorgverzekering
** zonder vakantietoeslag, lage WW premie als NL SV

SV in land WG	Inwoner D NL werkgever 100% werkzaam in NL	Inwoner D D werkgever 100% werkzaam in D	Inwoner NL D werkgever 100% werkzaam in D	Inwoner NL NL werkgever 100% werkzaam in NL
Bruto salaris	€ 36,500	€ 36,500	€ 36,500	€ 36,500
Belasting NL	€ 2,282	€ 0	€ 0	€ 2,282
Belasting D	€ 0	€ 4,842	€ 4,842	€ 0
Premies*	€ 6,661	€ 7,382	€ 7,382	€ 6,661
Teruggave Compensatieregeling	€ 0	€ 0	€ 0	€ 0
Netto	€ 27,557	€ 24,276	€ 24,276	€ 27,557
Premies WG	€ 6,290	€ 8,021	€ 8,021	€ 6,290
Loonkosten**	€ 42,790	€ 44,521	€ 44,521	€ 42,790

SV in woonland	Inwoner in D NL werkgever 60% werkzaam in NL, 40% D	Inwoner D D werkgever 100% werkzaam in D	Inwoner NL D werkgever 60% werkzaam in D, 40% in NL	Inwoner NL NL werkgever 100% werkzaam in NL
Bruto salaris	€ 36,500	€ 36,500	€ 36,500	€ 36,500
Belasting NL	€ 755	€ 0	€ 0	€ 2,282
Belasting D	€ 1,963	€ 4,842	€ 1,997	€ 0
Premies*	€ 7,382	€ 7,382	€ 6,661	€ 6,661
Teruggave Compensatieregeling	€ 0	€ 0	€ 0	€ 0
Netto	€ 26,400	€ 24,276	€ 27,842	€ 27,557
Premies WG**	€ 8,021	€ 8,021	€ 6,290	€ 6,290
Loonkosten	€ 44,521	€ 44,521	€ 42,790	€ 42,790

*Als NL SV: inclusief nominale bijdrage zorgverzekering

** zonder vakantietoeslag, lage WW premie als NL SV

* For Germany: Statutory Pension, unemployment, health and nursing care (incl. Surcharge of 0.25% for employees without children; borne by employee only)

** German social security: Statutory Pension, unemployment, health and nursing care + approx. 2% for U1, U2, Insolvency Fund + workmen's compensation board (rough estimate; borne by employer only)