



## Dossier 6: New tax treaty Netherlands-Belgium (2023): an ex-ante assessment

Cross-Border Impact Assessment 2024



# Dossier 6: New tax treaty Netherlands-Belgium (2023): an ex ante assessment

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## Abbreviations

Art.	Article
AOW	General Old Age Act
OECD	Organization for Economic Cooperation and Development
TFEU	Treaty on the Functioning of the European Union
WAP	Law on Supplementary Pensions



## 1. Introduction

Over a year and a half ago, on June 21, 2023, the new tax treaty Netherlands-Belgium was signed.<sup>1</sup> After signing, the treaty should be dealt with by parliament, both in the Netherlands and in Belgium. Currently (October 2024), this parliamentary debate has not yet taken place and the concrete effective date is not yet known. Also, the announced joint article-by-article explanation of the new tax treaty has not yet been published. Thus, the treaty signed in 2001 and in force as of January 1, 2003, currently applies to current situations.

Although the joint article-by-article explanation is not yet available, a first comparison can already be made - based on the treaty text - between the new tax treaty and the current tax treaty. Among other things, the treaty provides for the elimination of a bottleneck cross-border obstacle with regard to teachers and professors. With respect to home working by frontier workers, the tax treaty does not contain a separate regulation and the much discussed (both in case law and in literature) pension provision remained unchanged compared to the current tax treaty.<sup>2</sup>

This report describes *ex ante*, possible effects of the new tax treaty for the Dutch/Belgian (retired) frontier worker: more concretely, is a change expected to occur compared to the current situation? In order to get an idea of the size of frontier workers, we can refer to CBS statistics on frontier commuters published at the end of March 2024.<sup>3</sup> This shows that in 2021, 42,000 residents of Belgium were working in the Netherlands and just over 11,000 residents of the Netherlands were working in Belgium. Data on retired cross-border workers are not readily available.

## 2. Objectives & Methodology

### 2.1. Existing or future impacts: Ex-post or ex-ante

This border impact assessment makes an *ex ante* estimate of the effects of the new Netherlands-Belgium tax treaty. It will examine which bottlenecks have been identified and addressed for the frontier worker. The focus is on the employee, civil servant and director-large shareholder who lives in one of the two countries and works in the other.

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<sup>1</sup><https://www.rijksoverheid.nl/actueel/nieuws/2023/06/21/nederland-sluit-nieuw-belastingverdrag-met-belgie>. Convention between the Kingdom of the Netherlands and the Kingdom of Belgium for the avoidance of double taxation with respect to taxes on income and for the prevention of fiscal evasion and avoidance (with Protocols), *Trb.* 2023, 77, available at: <https://zoek.officielebekendmakingen.nl/trb-2023-77.html>. The hyperlinks included in this document were last consulted on Sept. 30, 2024.

<sup>2</sup> Among others: Conclusion A-G Ettema December 22, 2023, ECLI:NL:PHR:2023:1210 and for fairly recent views in literature from both countries on this matter: S.H.W.A. Bemelmans, 'Spiegeltje spiegeltje aan de wand, wat is er met het collectief aanvullend pensioen van Nederbelgen aan de hand?', *Pensioenmagazine* 2023/69 en C.Hendrickx, '[Het nieuwe dubbelbelastingverdrag tussen België en Nederland] Gemiste kans - Vrij Gesteld', *Tijdschrift voor Fiscaal Recht* 2023/18, 650.

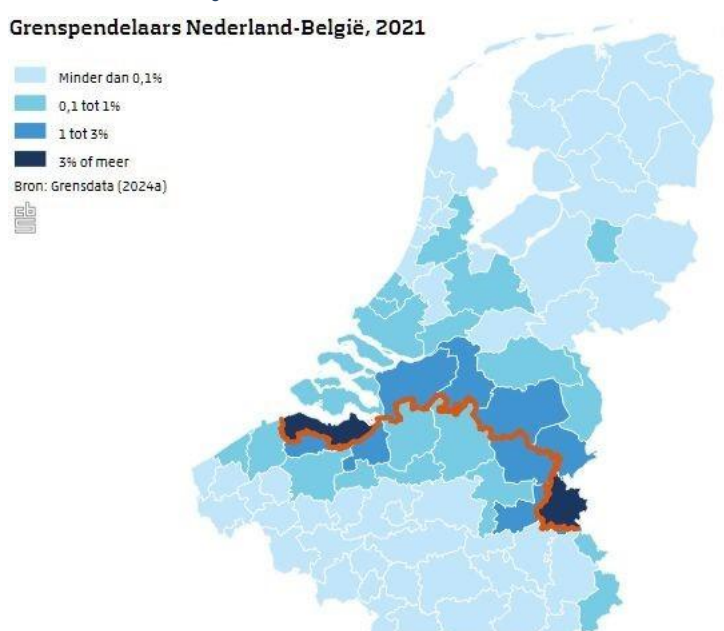
<sup>3</sup><https://www.cbs.nl/nl-nl/nieuws/2024/13/ruim-86-duizend-mensen-werken-in-nederland-en-wonen-in-duitsland-of-belgie>. For a further discussion of these figures, see also H. Bierings, 'Vrijwel evenveel grenspendelaars uit België en Duitsland', *Vakblad Grensoverschrijdend Werken* 2024, 65, p. 18-19.

## 2.2. Delineation: defining the relevant border region

The figure below illustrates part of the border commute (i.e. workers from Belgium to the Netherlands) as it takes place between the Netherlands and Belgium and *vice versa*. Concrete data on e.g. the self-employed or distinctions by type of worker (e.g. civil servant) are not available.

What all cross-border commuters do have in common is that for their tax position, they have to deal not only with national tax laws of both countries, but also with the tax treaty. A new tax treaty may therefore bring financial effects depending on the typing worker.

Figure I: CBS - Border commuters Netherlands-Belgium in 2021 <sup>4</sup>



## 2.3. Dossier's central research themes, principles, benchmarks and indicators

### 2.3.1. The dossier from the perspective of the research themes mentioned above

The core theme in this dossier, is the theme of European integration. The freedom of movement where the comparison between a frontier worker and a non-frontier worker is central, comparing the old/current tax treaty with the new tax treaty.

The other two themes, "socioeconomic/sustainable development" and "Euroregional cohesion," are not addressed, or only to a very limited extent, given the nature of this dossier (not so much qualitative and quantitative in terms of research methodology). In addition, it can be noted that the approach of a tax treaty is, among other things, to avoid double taxation and thus also to contribute to the business climate in the border region. Thus, a link can also be made to the theme of "socio-economic/sustainable development."

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<sup>4</sup> <https://www.cbs.nl/nl-nl/nieuws/2024/13/ruim-86-duizend-mensen-werken-in-nederland-en-wonen-in-duitsland-of-belgie>

### 2.3.2. Defining principles, benchmarks and indicators for establishing a positive situation in border regions

The assessment framework below serves as a starting point for the border effect assessment of the Netherlands-Belgium Tax Treaty in the border regions. Based on the indicators, it will be possible to arrive at findings in terms of border effects.

Table 1: Central research themes, principles, benchmarks and indicators for assessing the cross-border effects on the frontier worker under the new Netherlands-Belgium tax treaty

Research topic	Principles	Benchmarks	Indicators
European integration	<p><b>Free movement of EU citizens</b>  <i>ex Art. 21 TFEU in conjunction with Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Pb.L. June 29 2004, vol. 229, 35;</i></p> <p><b>Free movement of workers</b>  <i>ex. art. 45 TFEU;</i></p> <p><b>Freedom of establishment (self-employment)</b>  <i>ex art. 49 TFEU; non-discrimination</i></p>	<p>No discriminatory treatment of frontier worker</p> <p>Equality with the colleague (equality on the workplace)</p>	<p>A <u>general comparison</u> of the changes between the old and new tax treaty affecting frontier workers.</p> <p>Comparison between resident and nonresident taxpayers; Is there a obstruction of the freedom to live outside of Belgium and the Netherlands, respectively?</p>
	<p><i>International Law:</i></p> <p><i>a. Objective of the tax treaty: prevention of (juridical) double taxation.</i></p> <p><i>b. Art. 26 Treaty NL-BEL, non-discrimination.</i></p>	<p>No (juridical) double taxation: one object (earned income) and one subject (frontier worker) are taxed by two states.</p>	<p>Examine under what circumstances the new tax treaty leads to double taxation or double non-taxation.</p>

### 3. Tax treaty changes: a comparison

In the news release announcing the new tax treaty and as published on [rijksoverheid.nl](https://rijksoverheid.nl) it is indicated that the new tax treaty provides for the elimination of cross-border obstacles that may still occur under the current treaty.<sup>5</sup> With regard to the following treaty provisions, this chapter discusses whether and to what extent changes have occurred, what conceivable cross-border obstacles may occur, and whether these have been provided for. Based on a discussion of the equivalents of:

- Article 14, Article 5 in conjunction with Article 7 OECD Model Convention (the self-employed);
- Article 15 OECD Model Convention (employees);
- Article 16 OECD Model Convention (executives);
- Article 17 OECD Model Convention (athlete and artist);
- Article 18 OECD Model Convention (pensioner);
- Article 19 OECD Model Convention (civil servants); and
- the (high) teacher provision.

In addition to these provisions, the compensation scheme will also be discussed. Then, Chapter 4 will look at this in light of the theme of European integration.

#### 3.1 The self-employed - article 5 in conjunction with article 7 new treaty

Under the current treaty, the self-employed fall under the operation of the equivalent of Article 14 OECD Model Convention. This provision covering self-employment is now no longer part of the OECD Model Convention. Currently, a resident of Belgium or the Netherlands operating in the other country must have a fixed base in order for tax on income generated there to accrue to that country. The interpretation of the term 'fixed base' is interpreted in accordance with the interpretation of the term 'permanent establishment'.<sup>6</sup> The latter term is included in Article 5 of the OECD Model Convention. In the present treaty, in line with many tax treaties recently concluded by the Netherlands, it has been decided not to include Article 14 of the OECD Model Treaty. In concrete terms, this means that a self-employed person working in the other country will fall under the scope of Article 5 in conjunction with Article 7 of the OECD Model Convention. However, from a tax as well as income perspective, this has no consequences compared to the current situation. Similar issues regarding the personal scope compared to Article 15 OECD Model Convention may remain. Which is relevant in light of, for example, the discussion in the Netherlands about the qualification of employment relationships and thus the distinction between employment and entrepreneurship.<sup>7</sup>

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<sup>5</sup> <https://www.rijksoverheid.nl/actueel/nieuws/2023/06/21/nederland-sluit-nieuw-belastingverdrag-met-belgie>

<sup>6</sup> See, for example: J. van Poppel, *NDFR commentaar artikel 14 OESO-Modelverdrag*, bijgewerkt tot 26 augustus 2024, par. 3.4, online te raadplegen via [NDFR.nl](https://www.ndfr.nl).

<sup>7</sup> For the practicalities of this, see: <https://www.belastingdienst.nl/wps/wcm/connect/nl/arbeidsrelaties/>.

### 3.2 The worker - article 14 new treaty

The CBS-figures of border commuters included above refer to this target group.

In terms of content, the provision on non-self-employed work has not changed from the current treaty. This provision comes into play for secondment from Belgium to the Netherlands and *vice versa*. This provision also applies to frontier work. With regard to the frontier worker working from home, the new tax treaty does not offer any concessions to make it possible to work from home without this affecting the right to levy tax on the employment income. At the request of the Ministry of Finance, calculations were made by EY that provide insight into the income effects of such a home-working arrangement, including in the relationship with Belgium.<sup>8</sup> In the relationship with Belgium, further discussions will be held in 2024 on an adaptation of the treaty for the situation of frontier workers.<sup>9</sup> This will also take into consideration the application of the Framework Agreement, which is relevant in view of possible discoordination in tax payments (country A) versus social security payments (country B). The conclusion of the report is that a home working arrangement for a teleworking frontier worker is not necessarily beneficial from an income and administrative point of view.

Recent documents, such as the Tax Plan 2025, reveal that in relation to Germany there is ongoing discussion on a possible amendment of the Protocol to the tax treaty providing relief for a home-working rule (of up to 34 days).<sup>10</sup> Incidentally, it should be noted in this regard that a threshold rule of a maximum of 34 home-working days neutralizes the tax consequences of only very occasional home-working.

Belgium is not mentioned in that context. However, there is an agreement between the Netherlands and Belgium that serves as a guideline for practice regarding the question of whether a home workplace qualifies as a permanent establishment.<sup>11</sup> The guideline states that a maximum of 50% working from home will not quickly result in a permanent establishment of a Dutch employer for an employee living in Belgium who works from home (and the mirror image situation). This guidance is particularly intended for employers who employ employees who work from home and are confronted with additional burdens (administrative, think of setting up a payroll administration, as well as fiscal) in the presence of a permanent establishment in a country other than the country of establishment.

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<sup>8</sup> EY, *Thuiswerkregelingen voor grensarbeiders; Een onderzoek naar de impact van potentiële thuiswerkregelingen met België en Duitsland*, 18 maart 2024, in opdracht van ministerie van Financien, published at: <https://www.rijksoverheid.nl/documenten/rapporten/2024/03/29/rapport-thuiswerkregelingen-voor-grensarbeiders>. An earlier Cross-Border Impact Assessment also addressed these effects, see: M.J.G.A.M. Weerepas, P. Mertens & M. Unfried, *Grenseffectenrapportage 2021; Dossier 2: Impactanalyse naar de toekomst van thuiswerken voor grensarbeiders na COVID-19*, 2021, accessed via: <https://crossborderitem.eu/grenseffectenrapportage-2021-dossier-2-impactanalyse-naar-de-toekomst-van-thuiswerken-voor-grensarbeiders-post-covid-19-2/>.

<sup>9</sup> Brief Staatssecretaris van Financiën, Internationaal fiscaal (verdrags)beleid, nr. 25087, nr. 326, p. 7.

<sup>10</sup> See: Wetsvoorstel Belastingplan 2025, p. 198 en 199, accessed via: <https://www.rijksfinancien.nl/sites/default/files/rapporten/belastingplan-2025/wetsvoorstel-belastingplan-2025/2-wetsvoorstel-Belastingplan-2025.pdf>.

<sup>11</sup> Agreement between the competent authorities of the Netherlands and Belgium on the interpretation of Article 5 of the tax treaty (permanent establishment) in the case of employees working from home, *Government Gazette* 2023, 33856.



In practice, moreover, reference is made to a "broad" permanent establishment concept in Belgian domestic law and the question is how this agreement relates to it.<sup>12</sup>

### 3.3 The director, commissioner - article 15 new treaty

The provision relating to directors' and supervisory directors' fees has been amended to bring it more in line with Article 16 of the OECD Model Convention. On the understanding, however, that a second paragraph has been added indicating that a split between activities as a director under the articles of association and as an employee is conceivable. In the case of the former, tax is levied in the country where the company has its registered office, while in the case of employee activities, the right to levy tax is determined by means of the provision on independent employment (Art. 14). A similar split is common in practice. The right to levy taxes on managerial activities *as such* has not changed compared to the current treaty: the state of residence (of the company) is competent to levy taxes. The old treaty referred to 'manager' and the provision had four parts. The new treaty is less specific. A concrete different interpretation in terms of personal scope cannot be read into it. All in all, this new provision is not expected to have direct income effects. It should be noted, however, that perhaps even more efforts will be made than under the old treaty to achieve the most financially beneficial possible split, if possible, between the work of a director and the work of an employee. For the record, a director-major shareholder residing in the other country also comes into contact with this provision.

### 3.4 The athlete and artist - article 7 or article 14 new treaty

The 2001 Netherlands-Belgium tax treaty contains a separate provision (Article 17), to some extent mindful of Article 17 of the OECD Model Convention, which provides for the determination of taxing rights on the income of athletes and performers. The taxation of such income accrues to the state where the performance/sport takes place. From a Dutch tax policy perspective, a deviation from this system is preferred, as can be seen, for example, in the memorandum Fiscal Treaty Policy 2020.<sup>13</sup> Specifically, this means that the Netherlands was in favor of a residence state levy for such income and now a limited source state levy to avoid, among other things, administrative burdens related to remittance in the temporary state of employment.<sup>14</sup> In the new treaty, the Netherlands' efforts seem to have been adopted in the sense that an artist and sportsman provision is missing. To determine the right to levy tax on the income of artists and sportsmen under the new treaty, depending on the position (self-employed/non-employed), Article 7 in conjunction with Article 5 or Article 14 of the new treaty will apply.

The concrete size of this target group is not available. Abolishing the artist and athlete provision may result in income effects for the individual concerned, as the tax does not necessarily accrue to the temporary state of employment.

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<sup>12</sup> See in this context: A.M. Lahaije, 'Overeenkomst met België over interpretatie vaste inrichting bij thuiswerkende werknemers', *Over De Grens* 2024-002 en S. Matthys, 'Reikwijdte van de interpretatie 'vaste inrichting' bij thuiswerk, zoals verduidelijkt in de overeenkomst tussen België en Nederland', *Vakblad Grensoverschrijdend Werken* 2024, 65, p. 16-17.

<sup>13</sup> Fiscal Treaty Policy Note 2020 (*Kamerstukken I* 2019/20, 25087, N). p. 21-23.

<sup>14</sup> Fiscal Treaty Policy Memorandum 2011 (*Kamerstukken II* 2010/11, 25087, 7), pp. 58-59.

### 3.5 The pensioner - article 16 new convention

One of the most discussed provisions in the current treaty is the pension provision (Article 18 of the 2001 treaty), both in policy terms (compare, among others, the 2017 agreement, a knowledge group position paper), in case law and in literature.<sup>15</sup> In particular, this concerns the conditions of application of the conditional source state-tax as laid down in paragraph 2(b).<sup>16</sup> Often, the question focused on whether/and to what extent the right to levy tax on Dutch pensions received by a resident of Belgium shall be allocated to the Netherlands as source state. This must be determined on the basis of three cumulative conditions, one of which is the method of levying in Belgium.

Belgium had longstanding case law under which pensions to which a taxpayer already acquired an individual and vested right during accrual could not be re-taxed as a pension upon payment. However, this line of case law applied to pensions accrued before the Belgian Supplementary Pensions Act (WAP) entered into force in 2004.

On the Belgian side, national law was adjusted in 2021, meaning that Dutch pensions are taxed progressively.<sup>17</sup> Since then, foreign pensions, including Dutch pension benefits, have been progressively taxed. In fact, this circular concerns an attempt to sideline the exemption based on the "theory of individually and definitively acquired rights." Incidentally, the Belgian Constitutional Court has ruled against this legislative change.<sup>18</sup> The legislative amendment in itself was approved by the Court but the Court opposed the retroactive effect for the year 2021. Thus, as a result of this ruling, the law change did not take effect until January 1, 2022. It can also be inferred from the ruling that for years prior to Jan. 1, 2022, the legislation may not have granted Belgium the full progressive tax rate on foreign pensions. For tax years prior to 2022, it remains true that pension benefits originating from the Netherlands, the entitlement to which was accrued before 2004, are not taxable as deferred pension income in Belgium. To the extent that these pension benefits have remained untaxed in Belgium, the taxing rights do accrue to the Netherlands on the basis of Article 18 paragraph 2 subsection b of the Convention.<sup>19</sup> Discussions may continue to arise in this regard.

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<sup>15</sup> See also, for example, Woo Request on the Netherlands-Belgium Tax Treaty (2023) of April 23, 2024, [https://www.rijksoverheid.nl/documenten/woo-besluiten/2024/04/23/besluit-op-woo-verzoek-over-belastingverdrag-nederland-belgie#:~:text=Besluit%20op%20Woo%2Dverzoek%20over%20belastingverdrag%20Nederland%2DBelgi%C3%AB,-Woo%2Dbesluit%20%7C%2023&text=Besluit%20op%20een%20verzoek%20om,Nederland%20en%20Belgi%C3%AB%20\(2023.](https://www.rijksoverheid.nl/documenten/woo-besluiten/2024/04/23/besluit-op-woo-verzoek-over-belastingverdrag-nederland-belgie#:~:text=Besluit%20op%20Woo%2Dverzoek%20over%20belastingverdrag%20Nederland%2DBelgi%C3%AB,-Woo%2Dbesluit%20%7C%2023&text=Besluit%20op%20een%20verzoek%20om,Nederland%20en%20Belgi%C3%AB%20(2023.)

<sup>16</sup> With respect to the 'vested rights issue' see, among others: S. Bemelmans, 'Fiscale behandeling van Nederlands collectief aanvullende pensioenen in het licht van de definitief en individueel verworven pensioenrechten problematiek', *TFR* 2023/7, nr. 639; S. Bemelmans, 'Het Belgisch fiscaal regime van Nederlandse collectieve aanvullende pensioenen beschouwd vanuit internationaalrechtelijke context', *TFR* 2023/2, nr. 634.

<sup>17</sup> Circular 2022/C/95 on the internal law tax treatment of foreign collective supplementary pension promises and art. 28 of the Law of January 21, 2022 'houdende diverse fiscale bepalingen', [https://www.ejustice.just.fgov.be/cgi/article\\_body.pl?language=nl&caller=summary&pub\\_date=22-01-28&numac=2022040046](https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&caller=summary&pub_date=22-01-28&numac=2022040046). The latter law amended art. 39, par. 2 ITC 1992.

<sup>18</sup> Constitutional Court, Dec. 14, 2023, No. 170/2023 (<https://www.const-court.be/public/n/2023/2023-170n.pdf>).

<sup>19</sup> See also The taxation of a supplementary pension (2nd pillar) originating in the Netherlands - Avoiding double taxation, Federal Public Service Finances, accessed online Dec. 4, 2022 at <https://financien.belgium.be/nl/Actueel/de-belastingheffing-van-een-aanvullend-pensioen-2de-pijler-afkomstig-uit-nederland-%E2%80%93>.

The new treaty has a similar provision to the current treaty; the income limit of 25,000 euros, for example, has not changed.<sup>20</sup> In addition to supplementary pensions, AOW benefits and annuities, for example, also fall within the scope of this pension provision. In order to get an idea of the size of this group, we can refer to figures from the SVB from February 2024, 63,970 AOW beneficiaries live in Belgium.<sup>21</sup> Mirror image data are not available.

Given the similar treaty text, no immediate income effects are to be expected compared to the current treaty, subject, therefore, to the elaboration of national laws and regulations.

### 3.6 The civil servant - article 16 new treaty

The provision dealing with government functions is, textually, unchanged from the current treaty. The taxation of income earned by an individual performing a government function is in principle assigned to the state where the government body is located. Specifically under the current treaty, there is no case law or policy expressions that provide further detail on this provision. This does exist in relation to Germany, both in the situation of working from home and also of secondment from a Dutch public law entity to a German public law entity.<sup>22</sup> The conclusion from both of the above points is that the right to levy taxes in those cases also belongs to the state where the government body is located. We have no indication that this would be different in relation to Belgium. All in all, this provision does not entail any direct income effects, is the estimate. Moreover, the size of this group of employed persons is not available.

### 3.7 The teacher and professor - article 14 or 17 new treaty

The professor article has been abolished in the new tax treaty. Under Article 20, paragraph 1 of the old treaty, income of professors and other members of the teaching staff were exempt from taxation in the state of employment for up to two years ("temporary work"). This led to an undesirable discoordination between taxation and social security; namely, during the first two years, a state of residence-approach applied for tax purposes, while the teacher/professor in question was insured for social security in the state of employment pursuant to Regulation 883/2004 (*lex loci laboris*).<sup>23</sup> This could lead to significant advantages or disadvantages, particularly in terms of tax and social security rate.

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<sup>20</sup> For a Knowledge Group position of the Inland Revenue regarding the application of the €25,000 limit, see <https://kennisgroepen.belastingdienst.nl/publicaties/kg041202420-verdrag-nl-bel-pensioenartikel-e-25-000-grens-in-migratiejaar/>. According to the Tax Office, the €25,000 limit should be tested on the basis of the amount of pension enjoyed during the foreign period. Article 18, second paragraph, last sentence, of the NL-BEL Convention speaks of "the total gross amount of the income components which, by virtue of the foregoing, would be taxable in the Contracting State from which they originate." See also Conclusion of A-G Ettema, December 22, 2023, No. 23/01000, ECLI:NL:PHR:2023:1210. See also C.L.J.R. Douven, 'Een wetswijziging in België die gevolgen heeft voor Nederland', *PensioenMagazine* 2022/105 and C. Hendrickx, 'Nederlandse pensioenen: gunstige rechtspraak opzijgezet door nieuwe Belgische wetgeving', *Grensoverschrijdend werken* 2022-46. Zie ook het commentaar van Van Dun bij Rechtbank Zeeland-West-Brabant 28 oktober 2022, nr. 21/1550 t/m 21/1553, *NTRF* 2022/3814.

<sup>21</sup>SVB, "Aantal AOW-gerechtigden opnieuw gestegen", available at: <https://www.svb.nl/nl/pers-en-nieuws/nieuwsberichten/aantal-aow-gerechtigden-opnieuw-gestegen>.

<sup>22</sup><https://kennisgroepen.belastingdienst.nl/publicaties/kg04120249-verdrag-nl-deu-art-18-heffingsrecht-bij-detachering-experts-door-publiekrechtelijke-instelling> and Hof 's-Hertogenbosch 20 December 2023, ECLI:NL:GHSHE:2023:4256.

<sup>23</sup> See also Report of the Committee on Frontier 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.

Under the new treaty provision, teachers and professors working across borders basically pay taxes in the country where they work. The new treaty removes this cross-border obstacle and creates more equality in the workplace. In the sense that, depending on the nature of the educational institution (private or public law), the tax will fall under the provision for non-self-employment or under the provision for government functions.

### 3.8 The compensation scheme

The old treaty (2001) has a compensation scheme for frontier workers, laid down in Article 27. Incidentally, this compensation arrangement was drafted unilaterally; Belgium did not consider such an arrangement appropriate given the number of neighboring countries.<sup>24</sup> This compensation scheme is the elaboration of the adage "equal treatment with the neighbor" with respect to the Dutch frontier worker. This article contains two compensation schemes aimed at frontier workers residing in the Netherlands who are employed in Belgium, receive income there and for which the right to levy taxes has been assigned to Belgium.

Paragraph 1 provides that the Netherlands will grant a reduction of tax to an individual who is a resident of the Netherlands and obtains remuneration from Belgium on which the taxing right is allocated to Belgium pursuant to the provisions of articles 15, 16, 17 and 18, paragraph 6 of the Convention. The reduction that the Netherlands will grant is equal to the amount by which the (Dutch and Belgian) tax and contributions payable in the current situation, exceeds the amount of (Dutch) tax and contributions payable, had they obtained the income from the Netherlands and the Netherlands had the right to levy tax on the element of income. The arrangement results in residents of the Netherlands who perform work in Belgium being treated no differently for tax purposes than residents of the Netherlands who perform such work in the Netherlands. A similar provision is not included for residents of Belgium performing labor in the Netherlands.

Although the compensation scheme of paragraph 1 *de facto* neutralizes differences between Dutch tax and contribution burden and Belgian tax and contribution burden in favor of the persons concerned, its primary purpose is to enable those who perform cross-border work in Belgium to directly offset the deductions of the Income Tax Act 2001 against Dutch taxation, i.e. deduction of mortgage interest for the owner-occupied home and annuity premiums.<sup>25</sup>

In order to mitigate the negative effects of the general compensation scheme as compared to the frontier worker scheme in the 1970 Convention, a special compensation scheme is included in paragraphs 2 and 3 of Article 27.

The new treaty also has a compensation scheme for frontier workers, laid down in Article 23. Compared to the 2001 treaty, the 2023 treaty contains only a general compensation scheme. Thus, a special compensation scheme in relation to the 1970 Convention no longer exists. This general compensation scheme means that the resident of the Netherlands who works in Belgium is ultimately treated the same fiscally as the person who lives and works in the Netherlands. The resident of the Netherlands working in Belgium receives compensation for the loss of certain deductions (e.g. mortgage interest deduction). This (general) compensation is provided if Dutch and Belgian taxation

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<sup>24</sup> *Kamerstukken II, 2001-2002, 28 259, no. 3, p. 5.*

<sup>25</sup> *Kamerstukken II, 2001-2002, 28 259, no. 3, p. 5.*



together (due to this frontier work) is higher than if only Dutch taxation applies. With one exception, discussed below, the compensation scheme in the 2023 treaty covers the same situation and scope as the 2001 treaty. It should also be noted that stock option rights are exempted from this compensation scheme (paragraph 3) to the extent that their value in Belgium forms part of the tax base in a different calendar year than the calendar year in which wages related to the stock option right are taken into account in the Netherlands. In case the stock options are taxed in Belgium at the time of grant, and in the Netherlands upon exercise, the Netherlands will not take the stock options into account when applying the compensation scheme.

#### **4. Conclusions and recommendations from a Euroregional perspective**

On the basis of a brief consideration of the relevant provisions dealing with international employment, the possible effects of the new tax treaty for a Dutch and Belgian frontier worker have been described in comparison with the current treaty. In doing so, consideration has also been given - where possible - to the principles of 'equality in the street' and 'equality in the workplace'. The assessment serves as an indication of the free movement of workers as understood under the central theme of this report: 'European integration'. Based on this analysis, it appears that the income effects remain unchanged for most provisions in the new treaty, apart from any changes in national tax law (e.g., base, rate). Some treaty provisions will be highlighted below from that perspective.

With regard to athletes and artists; and teachers and professors, they experience obstacles under the current treaty that are of an administrative nature, or they are confronted with discoordination between social security payments and fiscal contributions. With regard to professors, one of the recommendations from the report of the Committee on Frontier Workers has been followed up.<sup>26</sup> In the new treaty, the Netherlands' efforts seem to have been adopted in the sense that an artist and sportsman provision is abolished. For the determination of the right to tax on the income of artists and sportsmen under the new treaty, depending on the position (self-employed/non-employed), fall back on Article 7 in conjunction with Article 5 or Article 14 of the new treaty, respectively. The abolition of the artist and sportsman provision can have income effects for the individuals concerned, since the taxing right is not necessarily assigned to the temporary state of employment. This depends on the tax regulations in force in the competent country, e.g. determination of tax base, level of tax rate, etc. The professor article has been deleted in the new tax treaty. Under Article 20, paragraph 1 of the old treaty, income of professors and other members of the teaching staff, were exempt from taxation in the state of employment for up to two years ("temporary work"). Under the new treaty provision, teachers and professors working across borders basically are liable to tax in the country where they work. The new treaty removes this cross-border obstacles and creates more equality in the workplace.

With respect to other types of workers, bearing in mind the closed system of employment benefits (Articles 15 to 19 OECD Model Convention), no or limited changes have been made in the new treaty. The obstacles experienced by employees who work from home and the provision of clarity has not

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<sup>26</sup> Report of the Committee on Frontier 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.

been addressed by the new treaty to this extent in relation to Belgium.<sup>27</sup> However, the situation of frontier workers working from home is still under discussion between the Netherlands and Belgium. It has been decided not to let the signing of this treaty wait until these discussions are completed. Such an agreement will then be implemented in the tax treaty via an amending protocol. The choice for an eventual final arrangement for cross-border homeworking seems to be partly motivated by the extent of cross-border work, the direction of cross-border work, the extent of teleworking in the future among cross-border workers and the actual budgetary consequences. Moreover, in the tax treaties with Germany and Belgium, the Netherlands strives to achieve as much 'equality in the street' and 'equality in the workplace' for cross-border workers as possible, and to avoid discoordination between tax and social contribution levies wherever possible. The Netherlands is also pushing for this during treaty negotiations when it comes to working from home across the border.<sup>28</sup>

One of the most discussed provisions in the current treaty is the pension provision. This relates in particular to the conditions of application of the conditional source state tax as laid down in paragraph 2(b). The question often focused on whether and to what extent the right to levy tax on Dutch pensions received by a Belgian resident was assigned to the Netherlands as source state. Considering the discussion on this provision, also in case law, it is surprising that this provision has not been amended at all. Given the similar treaty text, no direct income effects are to be expected compared to the current treaty. That the discussion regarding paragraph 2(b) will return in part is not entirely unlikely.

The compensation scheme, intended for residents of the Netherlands working in Belgium, aims to achieve equality with the neighbor in the street. The retention of the compensation scheme in the new treaty is considered positive. However, the question remains to what extent there is equality with the neighbor in the street in the mirror image situation (Belgian cross-border worker, working in the Netherlands). It is possible that Belgium did not consider this appropriate because of the multitude of neighboring countries, but this cannot be stated with certainty. Further possible border effects cannot be determined until the publication of the article-by-article commentary on the 2023 treaty.

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<sup>27</sup> For a discussion of the current state of affairs, see: M.J.G.A.M. Weerepas en S.P.M. Kramer, 'Thuiswerken over de grens: de stand van zaken anno 2024', *Vakblad GOW* 2024/65.

<sup>28</sup> Minister of Social Affairs and Employment, New developments for home-based cross-border workers, Parliamentary letter June 6, 2023, 2023-0000306682.

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