ITEM
Cross-border

Maastricht University

Dossier 3: Kinderzuschlag (DE) and Kindgebonden budget (NL): the border worker falls between two stools?

Cross-Border Impact Assessment 2023

Dossier 3: *Kinderzuschlag* and child budget: the border worker falls between two stools?

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Abbreviations

BKGG	Bundeskindergeldgesetz
DA-KiZ	Durchführungsanweisung-KiZ
EStG	Einkommensteurgesetz
ECJ	Court of Justice of the European Union
SGB	Sozialgesetzbuch
SVB	Social Insurance Bank

1. Introduction

The design, structure and organisation of social security systems remain a national competence of Member States. In border regions, Member States' neighbouring countries and social security systems converge. This is especially the case for cross-border employment or family situations with a cross-border element (e.g. partners working across the border or children attending school across the border). This also applies to so-called family benefits, such as the German *Kinderzuschlag* and the Dutch kindgebonden budget, supplements to *Kindergeld* resp. kinderbijslag, aimed at supporting lower incomes.

However, in cross-border situations, cross-border workers may face adverse consequences due to the (nationally-focused) eligibility conditions. Namely, can a cross-border worker working in Germany, living (with children) in the Netherlands, qualify for German *Kinderzuschlag*? In that case, is he/she eligible for the Dutch child budget? Do they fall between two stools? Should this be the case, is this situation in line with European law and do both countries correctly interpret the regulations in cross-border situations? These questions, among others, are addressed in this dossier.

In addition, 2022 saw a change in the way the so-called *Kinderzuschlag* is viewed by Germany. Until 1 July 2022, non-residents, e.g. residents of the Netherlands working in Germany, could also claim *Kinderzuschlag* provided the conditions were met.[1] In other words, the 'Zuschlag' was exportable across 'the national border'. Why is *Kinderzuschlag* not being exported as it was before 2022? These questions, among others, are discussed in detail in this report under the heading the border worker: falls between two stools?

The present file thus comprises, on the one hand, an analysis/evaluation with regard to the residence criterion for entitlement to the *Kinderzuschlag* and the child budget, and the compatibility of this criterion with European freedom of movement. On the other hand, this file includes an examination of the non-exportability of the German *Kinderzuschlag* as of 1 July 2022. The question to what extent this is compatible with European freedom of movement will only be discussed in outline form.

[1] A description of the conditions for granting *Kinderzuschlag* can be found at: https://web.arbeitsagentur.de/kiz/ui/start.

2. Objectives & Methodology

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

The present file concerns an ex-post analysis of the border effects of granting *Kinderzuschlag* and *Kindgebonden Budget* in the border regions between the Netherlands and Germany. More specifically, the European legislation in force is taken into account here, e.g. Regulation (EC) No 883/2004. It is mainly the negative border effects, namely the bottlenecks and gaps, of the legislation in force that are studied.

A quantitative analysis of the border effects of this issue is, due to a lack of
adequate data collection, however, is not possible. In addition, most figures on cross-border work are somewhat dated and not fully representative, as the definition of 'cross-border worker' used is not delineated and not used in a coherent manner (i.e. who is included in the definition of 'cross-border worker'?).

2.2. Delineation: defining the relevant border region

Border workers in the border regions between the Netherlands and Germany face the border effects of the legislation on *Kinderzuschlag* and the *child budget*. In this report, the definition of border region includes the territory where cross-border labour occurs and which is separated by (territorial) national borders. More specifically, it refers to cross-border workers who live and work within a certain distance of the German national border. For the present report, this refers to political units, such as Municipalities, 'Landkreise' or Arrondissements.

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

2.3.1. The issue of *Kinderzuschlag* and child budget from the perspective of the research themes mentioned above

This file focuses on the theme of European integration, namely the free movement of workers and freedom of establishment for self-employed persons. This report compares the indicators, by methodology, with the benchmarks. The question whether a family living in the Netherlands or Germany and one of the parents working in Germany or the Netherlands, respectively, is also entitled to this *Kinderzuschlag,* or child budget. Based on the answer to this question, it can be determined to what extent the benchmark of an open labour market has been achieved. The intended benefit constitutes a corollary to the free movement of persons, ex Articles 45 and 49 TFEU, which prohibits discriminatory treatment of active employees and self-employed persons.

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

Following what was described in the previous section, the principles, benchmarks and research methodology in this report can be represented schematically as follows. The border effects of the new legislation on border regions can be examined from the perspective of European integration (freedoms, citizenship, non-discrimination). The border effects on socio-economic development/sustainable development and local or Euregional cohesion and cross-border governance structures were not examined as they are not directly affected by the proposed legislation. Based on the indicators, it will be possible to draw a conclusion regarding the border effects of this national legislation.

Table 1: Central research themes, principles, benchmarks and indicators for assessing cross-border impacts.

Research topic	Principles	Benchmarks	Indicators
European integration; non-discrimination	*Article 7(2) Regulation (EU) No 492/2011 on freedom of movement of employees within the Union*	The same 'tax and 'social benefits' by migrating employees as national employees	Have cross-border workers with children resident outside Germany (one of which the parents work in Germany) right at *Kinderzuschlag*? Are cross-border workers with children living outside the Netherlands (one of whose parents works in the Netherlands) entitled to the Child budget?
	Free travel and accommodation ex Art. 21 TFEU in conjunction with Directive 2004/38/EC Concerning the right of free traffic and stay on the territory of the member states for citizens of the Union and their family members, Pb.L. June 29 2004, vol. 229, 35; *Free movement of workers ex. art. 45 TFEU;* *Freedom of the self-employed ex art 49 TFEU.*	No discriminatory treatment of cross-border worker Equality with the colleague (equality on the shop floor)	Comparison between the obtaining *Kinderzuschlag/child* budget and the do not obtain of the *Kinderzuschlag/child* budget; Is there a obstruction of the freedom to live outside Germany or the Netherlands, respectively? No discriminatory treatment of cross-border worker living (with children) abroad

3. The legal framework: conditions for granting *Kinderzuschlag* and *kindgebonden budget*

As part of the *ex-post analysis,* the section below describes the conditions under which the German *Kinderzuschlag* and the Dutch *kindgebonden budget* are granted. More specifically, it considers to what extent a cross-border worker (living outside the national territory) may be eligible for these benefits. In this way, the following questions can be answered: are cross-border workers with children residing outside Germany (one of whose parents works in Germany) entitled to *Kinderzuschlag*? Are cross-border workers with children living outside the Netherlands (one of whose parents works in the Netherlands) entitled to the *kindgebonden budget*? In this way, a comparison can be made between obtaining *Kinderzuschlag/ Kindergebonden budget* and not obtaining it. Is there an obstacle to the freedom to live outside Germany or the Netherlands, respectively? In other words, to what extent is there discriminatory treatment of a cross-border worker living abroad with children?

Schematic representation of award conditions *Kinderzuschlag* and *kindgebonden budget*

The diagram below shows schematically and in outline form the conditions for granting the *Kinderzuschlag* and the *kindgebonden budget*. For the legal text of the relevant provision in both Germany and the Netherlands, please refer to Annex I. Herein, the relevant passages from the relevant provisions are also underlined. The conditions can be divided into three aspects:

1. The condition regarding entitlement to certain benefits;
2. The condition with respect to the insured person (parent; cross-border worker); and
3. The condition in respect of the children of the cross-border worker (parent).

Condition no.	Elaboration of German regulation	Elaboration of Dutch regulation
1. Condition regarding entitlement to certain benefits	Entitlement to *Kinderzuschlag* exists if one has an entitlement to *Kindergeld* (via EStG or BGGK)	Entitlement to the child budget exists when one receives payment of/is entitled to child benefit
2. Condition in respect of insured (parent; cross-border worker)	An entitlement to Kindergeld under the EStG exists when: - Applicant residing in Germany OR - Not resident in Germany but subject to unlimited tax liability in Germany OR - Not resident in Germany but - on request - subjected to unlimited tax liability (at least 90% domestic income subject to German tax) An entitlement to *Kindergeld* under the BKGG exists when:	An entitlement to child benefit exists when the applicant: Resident of NL is OR Employed in NL and therefore subject to wage tax.

	- Applicant is not subjected to unlimited tax liability AND - Applicant is in a *versicherungspflichtverhältnis* AND - Child(ren) is/are living in Germany	
3. Condition in respect of the children of the cross-border worker (parent)	Under BKGG, the child should be living in Germany or habitually residing in Germany	The child should be living in the Netherlands or should live in a country in which a right to child benefit exists based on Regulation (EC) no. 883/2004.

The above shows that - based on the legal requirements in respect of - the cross-border worker (as an insured person) can be eligible for *Kinderzuschlag* and child budget. Indeed, with regard to *Kinderzuschlag*, a person who is not resident in Germany, but is subject to unlimited tax liability there - or is treated as such on request - can also be eligible. A cross-border worker in Germany (residing in the Netherlands) whose income is taxed for at least 90% in Germany can, on request, be treated as being subject to unlimited tax liability for the purposes of the EStG, and thus in principle be eligible for *Kinderzuschlag*. However, this is subject to the additional requirement under the CGT that the child must be resident or habitually reside in Germany. A cross-border worker, resident in the Netherlands, employed in Germany whose children also live in the Netherlands, is therefore not eligible for German *Kinderzuschlag.* The question to what extent this is consistent with EU law will be addressed below.

With regard to the child budget, a cross-border worker (as an insured) working in the Netherlands (living in Germany) can also, in principle, be eligible for this benefit, provided he/she is employed in the Netherlands and subject to wage tax there. However, there is an additional requirement that the child must be resident in the Netherlands or in a country in which he/she is entitled to child benefit under Regulation (EC) No 883/2004. A cross-border worker, living in Germany, employed in the Netherlands whose children also live in Germany, is therefore in principle not eligible for the Dutch child budget.

The question to what extent this is consistent with EU law will be discussed further below.

4. Evaluation of the research theme European integration

4.1 Residence requirement with regard to children: compatible with Regulation (EU) No 492/2011?

The free movement of persons prohibits not only overt discrimination based on nationality, but also all covert forms of discrimination, which, by applying other distinguishing criteria, in fact lead to the same result. The residence requirement is more likely to be met by national workers with children residing in the same state than by workers who are nationals of another member state. Moreover, the granting of 'tax and social advantages' within the meaning of Regulation (EC) No 492/2011 may not be withheld from migrant workers. Consequently, the granting of such a benefit may not be made

conditional on the residence of the children of the benefit recipient in the territory in the Netherlands/Germany.

Regulation (EU) No 492/2011 of 5 April 2011: same tax and social benefits

Under Article 7(2) Regulation (EU) No 492/2011 of 5 April 2011 on freedom of movement for workers within the Union, migrant workers enjoy the same 'fiscal and social
Benefits' as the national workers of the host country. The Court of Justice defined these benefits as "*all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily by virtue of their objective status as workers or merely by virtue of the fact that they are residents, and the extension of which to workers who are nationals of other Member States appears appropriate for the purpose of facilitating their mobility within facilitate the Community*".[2]

However, the question is whether the child budget and the *Kinderzuschlag* can be classified as 'tax' or 'social' benefits. Cross-border workers are entitled to equal
treatment. Given the objective and eligibility conditions, it can be argued that both the *Kinderzuschlag* and the child budget qualify as a social or tax benefit. After all, both benefits are aimed at financially supporting low-income parents. Moreover, both benefits are granted to residents provided the children reside in the same state as the parent. In addition, the ECJ has interpreted the concept of "social benefits" very broadly.[3] It includes both benefits falling within the material scope of Regulation (EC) No 883/2004 and other social benefits such as discount cards for public transport. So also special non-contributory benefits.[4]

It can therefore be argued that the German *Kinderzuschlag should also be granted to* the cross-border worker living (with children) in the Netherlands, or outside Germany. It can also be argued that the Dutch child budget should also be granted to the cross-border worker living (with children) in Germany, or outside the Netherlands. Only in this way can equality in the workplace (with the colleague) be achieved. After all, the concept of 'social benefit' includes benefits granted simply because the beneficiary is domiciled at the national
state territory.[5] Border workers are generally in the same position as workers who are
are located in the national territory.

The residence requirement in respect of children - both under the *Kinderzuschlag* and the child budget - raises questions in the light of disguised discrimination and may be contrary to the free movement of persons and Article 7(2) Regulation (EU) No 492/2011. Seen from this European regulation, the German *Kinderzuschlag* should also be granted to Dutch cross-border workers, with children living in the Netherlands and working in Germany (and liable to tax there). On the other hand, the Dutch child

[2] ECJ EU 12 May 1998, C-85/96, *Martínez Sala*, [1998] ECR I-2691, para 25.
[3] For its elaboration, see also ITEM Cross-Border Impact Assessment 2018, file 4 *Baukindergeld*, available at https://crossborderitem.eu/grenseffectenrapportage-2018-dossier-4-baukindergeld/.
[4] ECJ EU 11 September 2007, C-287/05, Hendrickx, [2007] ECR I-6909. See also ECJ EU 30 September 1975, C-32/75, Cristini, ECR 1975, I-1085.
[5] See also ITEM Cross-Border Impact Assessment 2018, file 4 *Baukindergeld*, available at https://crossborderitem.eu/grenseffectenrapportage-2018-dossier-4-baukindergeld/.

budget should also be granted to the German cross-border worker, with children living in Germany and working in the Netherlands (and liable to tax there).

Since the *Kinderzuschlag* and the child budget are to be considered a benefit under Article 7(2) Regulation (EU) No 492/2011, cross-border workers - with children living outside the national territory - are entitled to them.

4.2 Residence requirement with regard to children: compatible with freedom of movement (Articles 45 and 49 TFEU)?

Any national of a Member State who uses or has used the right of free movement of workers or of freedom of establishment and a professional activity in another Member State than his state of residence, regardless of his place of residence and nationality, falls within the scope of Articles 45 TFEU and 49 TFEU.[6] The treaty provisions on free movement of persons aim to make it easier for community nationals, regardless of which profession throughout the territory of the EU, and they stand in the way of measures which treat such nationals less favourably when in the territory of another Member State to pursue an economic activity.[7] The extent to which the residence requirement in respect of children under the *Kinderzuschlag* and child budget is at odds with this will be discussed below.

The principle of equal treatment enshrined in Article 45 TFEU (Article 21 TFEU for non-actives) prohibits not only overt discrimination based on nationality, but also all covert forms of discrimination, which, by applying other distinguishing criteria, in fact lead to the same result.[8] The residence requirement with regard to children can also be subsumed under this, as this other distinguishing criteria in fact leads to the same result. Unless it is objectively justified, and proportionate to the aim pursued, a provision of national law must be regarded as indirectly discriminatory if it is more likely to affect its migrant workers than national workers and therefore more likely to disadvantage migrant workers.[9] This is the case with a residence requirement in general, which is more easily satisfied by national workers than by workers who are nationals of another Member State. However, it can also be said of a residence requirement in relation to children.

Furthermore, the CJEU has considered that provisions which prevent or discourage a national of a Member State from leaving the State of origin in order to exercise the right of free movement therefore constitute obstacles to this freedom, even when they apply independently of the nationality of the workers concerned.[10] This last consideration is particularly important for the present case. Indeed, it broadens the prohibition of discrimination beyond the nationality of the worker concerned. It may concern, for example, the location of the owner-occupied dwelling for which *Baukindergeld* is

[6] See ECJ EU 21 February 2006, C-152/03, Ritter-Coulais, ECR 2006, I-1711, para 31; ECJ EU 7 September 2006, C-470/04, N, ECR 2006, I-7409, para 28, and ECJ EU 18 July 2007, C-212/05, Hartmann, ECR 2007, I-6303, para 17.
[7] See also ITEM Cross-Border Impact Assessment 2018, file 4 *Baukindergeld*, available at https://crossborderitem.eu/grenseffectenrapportage-2018-dossier-4-baukindergeld/.
[8] ECJ EU 23 May 1996, C-237/94, *O'Flynn*, *[*1996] ECR I-2671, para 17.
[9] ECJ EU 23 May 1996, C-237/94, *O'Flynn*, *[*1996] ECR I-2671, para 20.
[10] CJEU 15 September 2005, C-464/02, Commission v Denmark, ECR 2005, I-7929, para 35;
CJEU 26 October 2006, C-345/05, Commission v Portugal, [2006] ECR I-10633, paragraph 16, and CJEU 11 September 2007, C-318/05, Commission v Germany, [2007] ECR I-6957, paragraph 115.

claimed.[11] *Mutatis mutandis,* however, it may also be the child's place of residence for which *Kinderzuschlag* or child budget is claimed. After all, the cross-border worker working in Germany cannot claim *Kinderzuschlag,* as his children also live outside Germany (assuming a joint household). Indeed, the cross-border worker working in the Netherlands cannot claim child budget*, as his children also* live outside the Netherlands (assuming a joint household). Although these persons are in the same situation as the German and Dutch colleague respectively, they are treated differently on the basis of the children's residence outside the relevant national territory.

The eligibility conditions of the *Kinderzuschlag* or the child-related budget - in particular the residence requirement for the children - seem to have a disincentive effect on cross-border workers, who exercise the right to free movement deriving from Articles 45 and 49 TFEU, and live (with family) in a different Member State from where they work.

[11] See ITEM Cross-Border Impact Assessment 2018, file 4 *Baukindergeld*, available at https://crossborderitem.eu/grenseffectenrapportage-2018-dossier-4-baukindergeld/.

4.3 Germany: unilateral change interpretation of *Kinderzuschslag*: from family allowance to social benefit

From 1 July 2022, Germany changed its national qualification - under European social security law - of the *Kinderzuschlag*. Indeed, with effect from the said date, Germany no longer regards this benefit as a family *benefit* but as a social benefit, as a result of which Germany is no longer obliged to export these benefits. [12]

This change of qualification follows from the so-called *Durchführungsanweisung-KiZ* (DA-Kiz), in its June 2015 version[13] and 15 June 2022[14] . Indeed, the 2015 version states that (German) family benefits include the *Kinderzuschlag* and thus fall within the material scope of Regulation 883/2004.[15] This means, for example, that the anti-cumulation provisions of Regulation (EC) No 833/2004 apply, such as Article 68 of this Regulation. The latter provision regulates which state is primarily and secondarily responsible for the payment of family benefits (child benefit, parental benefit, care allowance and similar benefits from other states) if a child is entitled to family benefits in several member states.

In the 2022 version of the Durchführungsanweisung-KiZ, the introduction explains, among other things, the purpose of *Kinderzuschlag* and also that *Kinderzuschlag* is a social benefit.[16] Namely, *Kinderzuschlag* is paid to parents who cannot or just barely cover the needs of the whole family with their own income or assets. It is intended to provide targeted support to low-income families. The Kinderzuschlag is a need- and income-related social benefit granted in addition to the *Kindergeld*. Together with the *Kindergeld* and the child's attributable portion of the housing allowance, it covers the average needs of children in the amount of benefits according to SGB II.

Below, we will first consider the underlying European framework with regard to this qualification of *Kinderzuschlag* as a family *benefit* and what its implications are. It will then be considered to what extent this complies with EU law, more specifically the freedoms of movement.

Family benefits under Regulation (EC) No 883/2004 and Implementing Regulation (EC) No 987/2009

While social security is a national competence, Regulation (EC) No 883/2004 (hereinafter Coordination Regulation) and Implementing Regulation (EC) No 987/2009 coordinate at the European level. These lay down the conflict rules for the coordination of Member States' social security systems. Based on the principle of exclusivity, persons covered by the Regulation are subject to the legislation of one Member State. The competent member state is determined by the rules on applicable law. As regards maternity and paternity benefits, the same coordination rules for sickness benefits apply as in Title III, Chapter 1 of the coordination Regulation. Family benefits, such as parental benefits, on the other hand, are coordinated by the rules in Chapter 8. According to Article 1(z) of the Coordinating Regulation, "family benefits" means "all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth or adoption allowances referred to in Annex I."

[12] See also preamble para 37 Regulation (EC) No 883/2004.
[13] https://www.arbeitsagentur.de/datei/fw_ba013318.pdf.
[14] https://www.arbeitsagentur.de/datei/fw-bkgg_ba013284.pdf.
[15] https://www.arbeitsagentur.de/datei/fw_ba013318.pdf, p. 18.
[16] https://www.arbeitsagentur.de/datei/fw-bkgg_ba013284.pdf, p. 3.

The term 'family benefits' covers a wide variety of social security benefits, including not only traditional child benefits, but also other types of family benefits, for example benefits that boost parents' educational attainment or labour force participation, or that replace income during periods of child rearing.[17] Not all benefits paid to families are family benefits; they must be intended to cover family expenses. What approach the CJEU favours in this qualification will be discussed in more detail below.

The ECJ's approach to classifying benefits: which coordination rules and exportable?

At first glance, the list of benefits in Article 3(1) of Regulation 883/2004 seems fairly unproblematic. However, given the different regimes of all EU Member States, determining into which category a specific benefit can be categorised seems problematic. This categorisation of benefits is relevant for two reasons.[18] First, to determine whether a particular benefit falls within the material scope of the regulation, as in the case of the *Kinderzuschlag*. Second, to know which coordination rules apply. Moreover, this difference may be decisive in determining whether a particular benefit is exportable or not, particularly relevant for this report.

The CJEU reasoned in the Hoever and Zachow cases that, in order to determine which coordination rules apply, the constituent elements, in particular the purpose of the benefit and the conditions involved, are decisive.[19] In the present case, a German child-raising allowance (*Erziehungsgeld*) had to be qualified. The Court held that parental allowance is a family benefit, as it is paid only when the person's family has one or more children and its amount varies in part according to the age and number of the children.[20] The CJEU confirmed this approach in the *Kuusijärvi* case.[21] The Court ruled in that case that the parental benefit is intended, on the one hand, to enable the parents to devote themselves alternately to the care of the young child until that child goes to school and, on the other hand, to compensate, to a certain extent, for the loss of income entailed for the parent.[22]

The following can be deduced from the case-law of the Court of Justice of the EU: in order to determine which coordination is applicable, the constituent elements, in particular the purpose of the benefit and the conditions concerned, must be taken into account, namely eligible persons, the purpose of the benefit; the basis of calculation and the conditions of grant).

The inclusion of income-related benefits in the coordination system for family benefits has led to various problems of interpretation and sometimes to undesirable results.[23] The very broad interpretation by the CJEU when it comes to defining family benefits reached a crossroads in the Wiering case. Here, the Court had to recognise that not all family benefits are the same - at least not in overlapping situations. However, in the recent *Moser* case, on derived rights to income-related

[17] European Commission, *Commission staff working document. Impact assessment. Initiative to partially review Regulation (EC) No 883/2004, SWD (2016) 460*, Brussels, 2016 (Impact document), p. 124.
[18] F. Pennings, 'European Social Security Law', Antwerp: Intersentia 2022, p. 58 ff.
[19] CJEU 10 October 1996, I-04895, C-245/94 and C-312/94 (Hoever and Zachow), para 17.
[20] CJEU 10 October 1996, I-04895, C-245/94 and C-312/94 (Hoever and Zachow), para 24.
[21] ECJ EU 11 June 1998, I-03419, C-275/96 (Kuusijärvi).
[22] ECJ EU 11 June 1998, I-03419, C-275/96 (Kuusijärvi), para 65. See also ECJ EU 19 September 2013, C-216/12 and C-217/12 (Hliddal and Bornand), ECLI:EU:C:2013:568, para 33.
[23] E. Holm, 'Coordination of classic and specific family benefits - challenges and proposed solutions', 22(2) *European Journal of Social Security* (2020), pp. 196-211.

benefits for family members, the Court again showed that family benefits are indeed a right for the family and not for the individual parent.[24]

A related problem with the application of the current coordination rules to family benefits is that they are generally considered 'parent-focused' entitlements, designed to protect the individual parent concerned.[25] Under EU rules, however, family benefits are considered benefits for the family as a whole. This means that both parents can have a derived right to apply for such benefits even if that parent lives and works in another member state and has no personal link to the social security system of the member state granting the benefit. Some national authorities complain that there are administrative and practical problems for their institutions when a spouse or partner applies for a derivative right, as it is difficult to determine whether the national conditions are met.[26] These problems are compounded for wage-related family benefits when a family member who has no income in the member state granting the benefit applies.

Consequently, some Member States refuse to coordinate parental benefits as family benefits under EU coordination rules, classifying them instead as maternity benefits or equivalent paternity allowances in a way that circumvents both the anti-cumulation rules and the application of derived rights.[27] Despite the Commission's enforcement measures, few member states are currently in full compliance with EU law. According to the European Commission, the consequence of such divergent approaches is inconsistent treatment of families and unequal burden-sharing between Member States.[28] To solve these problems and respond to criticism, the European Commission has proposed revising the existing coordination rules.[29] It should be noted at the outset that this proposal has not yet been updated due to the deadlock in the negotiations on the revision of the coordination rules (Regulation (EC) No 883/2004).

The European Commission has proposed to treat child-raising allowances as individual and personal rights that can only be claimed by the parent to whom the relevant legislation applies (and not by other members of their family).[30] Thus, there is no derived right for his or her family members to such benefits. Moreover, it is proposed that no anti-overlap rules apply to such benefits, meaning that they must be paid in full to the parent concerned. There is an optional right for the 'secondary competent' member state to pay the benefit in full. In this context, it is proposed to insert a new Article 68b(1) to clarify that benefits intended to replace income while bringing up children, which are to be listed in Part I of the newly created Annex XIII, are to be granted under the legislation of the competent Member State exclusively to the person to whom that legislation applies, and that there are no derived rights to such benefits. Since benefits intended to replace income while bringing up children should be

[24] ECJ EU 18 September 2019, C-32/18 (*Moser*), ECLI:EU:C:2019:752.
[25] European Commission, *Commission staff working document. Impact assessment. Initiative to partially review Regulation (EC) No 883/2004, SWD (2016) 460*, Brussels, 2016 (Impact document), para 7.2.2.
[26] European Commission, *Commission staff working document. Impact assessment. Initiative to partially review Regulation (EC) No 883/2004, SWD (2016) 460*, Brussels, 2016 (Impact document), para 7.2.2.
[27] European Commission, *Commission staff working document. Impact assessment. Initiative to partially review Regulation (EC) No 883/2004, SWD (2016) 460*, Brussels, 2016 (Impact document), para 7.2.2.
[28] European Commission, *Commission staff working document. Impact assessment. Initiative to partially review Regulation (EC) No 883/2004, SWD (2016) 460*, Brussels, 2016 (Impact document), para 7.2.2.
[29] F. Pennings, 'European Social Security Law', Antwerp: Intersentia 2022, p. 133 ff.
[30] European Commission, *Commission staff working document. Impact assessment. Initiative to partially review Regulation (EC) No 883/2004, SWD (2016) 460*, Brussels, 2016 (Impact document), para 7.2.2.

listed in an Annex XIII to the regulation, it should be clear which national benefits belong to which group.

The proposal was accepted in the Council in June 2018 and enshrined in Article 68(2a) of the regulation, but not yet adopted.[31] The European Commission points out that this 'horizontal option' will provide mobile parents in the EU with greater protection in terms of child-raising allowances (calculated on the basis of salary/professional income or all types of such allowances), and by exempting these allowances from the application of derived rights and the anti-cumulation rules, will also reduce the regulatory costs for public authorities in administering these allowances and reduce delays for families in processing applications. [32]

Kinderzuschlag as special non-contributory benefits: no duty of exportability?

The previous section discussed the conditions and circumstances under which - according to the CJEU - the *Kinderzuschlag qualifies* as a *family benefit* and the consequences of this for the application of Regulation 883/2004. One of the main consequences is that there is a duty to export these benefits in those cases. Now that Germany no longer qualifies the *Kinderzuschlag* as such, but as a social benefit, the situation is different. If *Kinderzuschlag* qualifies as a special non-contributory benefit, there is no duty to export for the purposes of Regulation 883/2004. This will be considered in more detail below.

According to Pennings, Regulation (EC) No 883/2004 broadly follows the approach of Regulation 1408/71.[33] Article 3(3) states that Regulation 883/2004 also applies to special non-contributory benefits, as referred to in Article 70 of the Regulation. Article 70 states that it shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.

The second paragraph of this article provides that special non-contributory benefits are defined as benefits that:

(a) are intended:

(i) for the additional, supplementary or ancillary cover of the events in the branches of social security referred to in Article 3(1) and to guarantee to the persons concerned a minimum subsistence figure commensurate with the economic and social situation of the Member State concerned;

or

(ii) to provide only persons with disabilities with special protection that closely reflects their social circumstances in the Member State concerned;

and

[31] See https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM:2016:815:FIN.
[32] European Commission, *Commission staff working document. Impact assessment. Initiative to partially review Regulation (EC) No 883/2004, SWD (2016) 460*, Brussels, 2016 (Impact document), p. 162.
[33] F.J.L. Pennings, European social security law, Deventer: Kluwer 2022, para. 5.6.1. See also G. Vonk, 'The coordination of subsistence benefits in the European Union: looking back and looking forward', in A. Campo et al (ed.), Loyal cooperation within the EU, The Hague: Boom Juridische Uitgevers, 2020, pp. 193-204.

(b) financed exclusively by compulsory taxation intended to cover general public expenditure and for which the conditions for entitlement and calculation are not dependent on any contribution in respect of the person concerned. However, benefits provided to supplement contributory benefits shall not be considered to be contributory benefits for this reason alone;

and

(c) are listed in Annex X.

Although the German *Kinderzuschlag,* like the Dutch *kindgebonden budget*, meets the conditions in Article 3(1)(a) and (b), it is not included in Annex X of Regulation (EC) No 883/2004. It is the Community legislator who ultimately decides on this. It is therefore doubtful whether these benefits actually qualify as such; after all, these are three cumulative conditions. Therefore, we will consider below what conclusion can be reached in this regard based on the case law of the CJEU. In other words, to what extent is Germany's characterisation of the *Kinderzuschlag* as a supplement (special non-contributory benefit) in line with the approach of the CJEU?

When is a benefit a special non-contributory benefit according to the CJEU?

The question of whether a benefit qualifies as a special non-contributory benefit has been the subject of much debate. After all, this question is important for the possibility of exporting the benefit in question.[34] In order for a benefit to fall under the regime of special non-contributory benefits, Member States must include it in Annex X. Therefore, it is ultimately the Community legislator that decides on the qualification of the benefit.

CJEU rulings on this question show a gradient, i.e. from a broader placement of certain benefits on Annex X to a more narrow approach and interpretation. In the *Swaddling, Snares* and *Partridge* judgments, the Court took placement of the benefit on Annex X as given and concluded by reference to the Annex that the benefit in question did not need to be exported.[35] However, in the *Leclere* and *Jauch judgments,* the CJEU proved critical of benefits listed in the annex.[36] First, in the *Jauch judgment,* the Court held that being listed in the annex was not sufficient to answer the question of whether it was a special non-contributory benefit. The principle of free movement of workers means, the Court said, that derogations from the principle of exportability of social security benefits must be interpreted strictly. Furthermore, according to the CJEU - following the *Jauch judgment* - a benefit can be considered a social security benefit if, without individual and discretionary assessment of personal needs, it is granted to the beneficiaries by virtue of a legally defined position and is linked to one of the contingencies expressly mentioned in (what is now) Article 3.[37] The care allowance in the Jauch *case* was a benefit intended to improve the health and living conditions of persons in need of care; it aimed to supplement sickness benefits. Therefore, this benefit had to be considered a 'sickness benefit' within the meaning of the regulation and could not be considered a special benefit. Moreover, this

[34] F.J.L. Pennings, *European social security law*, Deventer: Kluwer 2022, para. 5.3.6.
[35] ECJ EU 25 February 1999, C-90/97, ECLI:EU:C:1999:96 (Swaddling); ECJ EU 4 November 1997, C-20/96, ECLI:EU:C:1997:518 (Snares); ECJ EU 11 June 1998, C-297/96, ECLI:EU:C:1998:280 (Partridge).
[36] ECJ EU 43/99, ECR 2001, I-4265 (Leclere; more information not available); ECJ EU 215/99, ECR 2001, I-1901 (Jauch; more information not available).
[37] CJEU 215/99, ECR 2001 I-1901 (Jauch; further information not available).

benefit was financed by statutory pension and accident insurance institutions. This indirect financing made the court consider that these benefits did not meet the condition of being non-contributory.

This approach was confirmed by the CJEU in the *Hosse* case.[38] The case concerned an Austrian care allowance for Sylvia, a disabled child of a German cross-border worker who worked in Austria and lived in Germany. The application for the benefit was refused as it would be a special non-contributory benefit. The court considered that the concept of social security benefit and the concept of special non-contributory benefit are mutually exclusive. Benefits which are granted on objective grounds on the basis of a situation defined by law and are intended to improve the state of health and the life of the dependent person are supplementary to sickness insurance benefits and must be regarded as sickness benefits within the meaning of the regulation. Thus, they do not constitute special non-contributory benefits.[39]

In another case, the CJEU did conclude that there was a special non-contributory benefit.[40] In the *Skalka judgment,* the Court considered that a special benefit is defined by its purpose.[41] It must replace or supplement a social security benefit and have the characteristics of a social assistance measure justified by economic and social reasons and enshrined in rules which apply objective criteria. The Austrian compensatory supplement was paid to supplement an insufficient pension to ensure a minimum standard of living for the beneficiary. In such cases, the benefit is linked to the socio-economic context of the country concerned and the amount fixed by law takes into account the average standard of living in the country concerned.[42] In such cases, the objective pursued would be lost, in this benefit would have to be granted outside the state of residence (of the insured parent; cross-border worker). Furthermore, in the *Skalka judgment,* the expenses were paid from public funds and the contributions of the insured persons were not used for funding, i.e. non-contributory. [43]

Along the lines of the established case-law of the CJEU, it can be concluded that the German *Kinderzuschlag* can also qualify as a special non-contributory benefit, despite not being listed in Annex X. Given its objective - to financially support low-income families who are unable or barely able to cover the needs of the whole seen with their own income or assets - it is aimed at ensuring a minimum standard of living for the family. Moreover, its award is based on objective criteria defined by law. In addition, the *Kinderzuschlag* is paid as a supplement to the *Kindergeld* which, as a social security benefit, falls within the scope of Article 3(1) Regulation (EC) No 883/2004. As the *Kinderzuschlag* is a need-based and income-dependent benefit, it is linked to the socio-economic context of the country concerned and the statutory amount takes into account the average standard of living in the country concerned. Furthermore, it is paid out of public funds and contributions are not used to finance it. Against this background, Germany rightly classifies the *Kinderzuschlag* as a special non-contributory benefit (assistance). In these cases, the objective pursued would be lost if this benefit had to be granted outside Germany.

[38] ECJ EU 21 February 2006, C-286/03, ECLI:EU:C:2006:125 (Hosse).
[39] F.J.L. Pennings, *European social security law*, Deventer: Kluwer 2022, para. 5.6.3.
[40] F.J.L. Pennings, *European social security law*, Deventer: Kluwer 2022, para. 5.6.3.
[41] ECJ EU 29 April 2004, C-160/02, ECLI:EU:C:2004:269 (Skalka).
[42] F.J.L. Pennings, European social security law, Deventer: Kluwer 2022, para. 5.6.3.
[43] The Court also followed this approach in CJEU 16 January 2007, C-265/05, ECLI:EU:C:2007:26 (Perez Naranjo).

The *Kinderzuschlag* as a special non-contributory benefit: implications under Regulation (EC) No 883/2004

Having concluded in the above that the German *Kinderzuschlag qualifies* as a special non-contributory benefit, the question arises as to what the consequences of this are. This will be explained below.

For example, because Regulation 883/2004 applies, no distinction may be made on the basis of nationality.[44] However, Article 70(3) of this regulation states that Article 7 (removal of residence requirements) and the other chapters of Title III do not apply to these benefits. Thus, special non-contributory benefits need not be exported. Article 70(4) Regulation (EC) No 883/2004 stipulates that the benefits are provided exclusively by the Member State in which the person concerned resides, in accordance with its legislation. These benefits are provided by, and at the expense of, the institution of the place of residence. It follows from this provision that if a benefit is a special non-contributory benefit, it need not be exported. This is a disadvantage for persons who receive such a benefit but wish to go to another Member State.[45] Article 70(4) Regulation (EC) No 883/2004 states that special non-contributory benefits are granted only by the Member State of residence. It is therefore important to know what is meant by the term 'residence'. This question came up in the *Swaddling judgment*. The CJEU considered that according to what is now Article 70 Regulation 883/2004, the special non-contributory benefit is paid in the Member State where the person concerned has his or her habitual residence and where the habitual centre of his or her interests is also located. In this context, said the CJEU, particular regard must be had to the worker's family situation, the reasons why he has gone to another country, the duration and permanence of his stay, whether he has a permanent job, if any, as well as the intention of the person concerned as revealed by all the circumstances.[46]

As a result, German *Kinderzuschlag is* not subject to a duty to export under Article 7 Regulation 883/2004. This is a disadvantage for individuals who receive such benefits but wish to go to another member state.

Non-export special non-contributory benefits compatible with free movement of workers?

An interesting ruling on special non-contributory benefits concerned the *Hendrix judgment*, in which the CJEU ruled that the provision on the non-exportability of these benefits should be interpreted in accordance with the Treaty provisions on the free movement of workers.[47] The CJEU tested the provision at issue against what is now Article 45 TFEU, and Article7 of what is now Regulation (EU) No 492/2011.

However, according to the CJEU, the provisions of the aforementioned regulation adopted under Article 48 TFEU must be interpreted with due regard to the purpose of this article. That purpose is to contribute to the establishment of the greatest possible freedom of movement for migrant workers.

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[44] F.J.L. Pennings, European social security law, Deventer: Kluwer 2022, para. 5.6.1.

[45] Cf. F.J.L. Pennings, European social security law, Deventer: Kluwer 2022, para. 5.6.1. Pennings points out that the regulation may also benefit people who go to live in a country that has such benefits. The Regulation's equivalence provision (Art. 5), which provides that if the legislation of the competent Member State assigns legal effects to certain facts or events, that Member State shall take into account similar facts or events occurring in another Member State as if they had occurred in its own territory, helps them meet the benefit conditions.

[46] F.J.L. Pennings, European social security law, Deventer: Kluwer 2022, para. 5.6.3.

[47] ECJ EU 11 September 2007, C-287/05, ECLI:EU:C:2007:494 (Hendrix). See also F.J.L. Pennings, European social security law, Deventer: Kluwer 2022, para. 5.6.3.

Consequently, the residence condition may be imposed on someone in *Hendrix*'s situation only if it is objectively justified and proportionate to the objective pursued, the Court said.

The residence condition as such, as set out in the national legislation, was thus objectively justified. This requires, however, continued the CJEU, that that condition does not adversely affect the rights which a person in *Mr Hendrix's situation* derives from the free movement of workers beyond what is necessary to achieve the legitimate aim pursued by the national legislation. The CJEU held that national courts must give an interpretation of national law that is compatible with Community law as far as possible. The referring court must therefore ensure that, in the circumstances of the case at issue, the imposition of the requirement of residence in the national territory does not result in unfairness, having regard to the fact that *Hendrix* made use of the right of free movement of workers and maintained his socio-economic links with the Netherlands.

While this is an interesting case in light of the non-exportability of *Kinderzuschlag,* it is difficult to take this case as a general guide for similar cases. The *Hendrikx* case concerned such a specific case that an application to the situation of non-exportability of *Kinderzuschlag* does not lead to a valid conclusion.

5. Conclusions and recommendations from a Euroregional perspective

This border effects report looked at the consequences of the conditions of awarding the *Kinderzuschlag* and *child budget* in cross-border cases. Both benefits are subject to a residence criterion in respect of the children.

Compatibility of children's residence criterion with Regulation (EU) No 492/2011

Since both the *Kinderzuschlag* and the child budget qualify as a social or tax benefit under Article 7(2) Regulation (EU) No 492/2011[48], migrant workers enjoy the same 'tax and social benefits' as the national workers of the host country. It can therefore be argued that the German *Kinderzuschlag should* also be granted to the cross-border worker living (with children) in the Netherlands or outside Germany. It can also be argued that the Dutch child budget should be granted to the cross-border worker living (with children) in Germany, or outside the Netherlands. Only in this way can equality in the workplace (with the colleague) be achieved. After all, the concept of 'social benefit' also includes benefits that are granted simply because the beneficiary is domiciled on the national state territory.[49] Border workers are generally in the same position as workers who are located in the national territory.

The residence requirement in respect of children - both under the *Kinderzuschlag* and the child-related budget - raises questions from the perspective of disguised discrimination and is contrary to the free movement of persons and Article 7(2) Regulation (EU) No 492/2011. Consequently, the German *Kinderzuschlag* should also be granted to Dutch cross-border workers, with children living in the Netherlands and working in Germany (and liable to tax there). On the other hand, the Dutch child budget must also be granted to the German cross-border worker, with children living in Germany and working in the Netherlands (and liable to tax there).

As the *Kinderzuschlag* and the child budget are to be considered a benefit under Article 7(2) Regulation (EU) No 492/2011, cross-border workers - with children living outside the national territory - are entitled to them.

Compatibility of children's residence criterion with EU freedoms of movement

The EU Court of Justice has held that provisions preventing or deterring a national of a Member State from leaving the State of origin in order to exercise the right of free movement therefore constitute obstacles to that freedom, even when they apply independently of the nationality of the workers concerned.[50] This last consideration is particularly important for the present case. Indeed, it broadens the prohibition of discrimination beyond the nationality of the worker concerned. It may concern, for example, the location of the owner-occupied dwelling for which *Baukindergeld* is claimed.[51] *Mutatis mutandis,* however, it may also be the child's place of residence for which *Kinderzuschlag* or child budget is claimed. After all, the cross-border worker working in Germany cannot claim *Kinderzuschlag,* as his children also live outside Germany (assuming a joint household). Indeed, the cross-border

[48] ECJ EU 11 September 2007, C-287/05, Hendrickx, [2007] ECR I-6909. See also ECJ EU 30 September 1975, C-32/75, Cristini, ECR 1975, I-1085.
[49] See also See also See also ITEM Cross-Border Impact Assessment 2018, file 4 *Baukindergeld*, available at https://crossborderitem.eu/grenseffectenrapportage-2018-dossier-4-baukindergeld/.
[50] CJEU 15 September 2005, C-464/02, Commission v Denmark, ECR 2005, I-7929, para 35;
CJEU 26 October 2006, C-345/05, Commission v Portugal, [2006] ECR I-10633, paragraph 16, and CJEU 11 September 2007, C-318/05, Commission v Germany, [2007] ECR I-6957, paragraph 115.
[51] See ITEM Cross-Border Impact Assessment 2018, file 4 *Baukindergeld*, available at https://crossborderitem.eu/grenseffectenrapportage-2018-dossier-4-baukindergeld/.

worker working in the Netherlands cannot claim *kindgebonden budget, as his children also* live outside the Netherlands (assuming a joint household). Although these persons are in the same situation as the German and Dutch colleague respectively, they are treated differently on the basis of the children's residence outside the relevant national territory.

The eligibility conditions of the *Kinderzuschlag* or the *kindgebonden budget* - in particular the residence requirement for the children - seem to have a disincentive effect on cross-border workers, who exercise the right to free movement deriving from Articles 45 and 49 TFEU, living in a Member State other than the one where they work.

Placing *Kinderzuschlag* on Annex X Regulation 883/2004

Along the lines of the established case-law of the CJEU, it can be concluded that the German *Kinderzuschlag* can also qualify as a special non-contributory benefit, despite not being listed in Annex X. Given its objective - to financially support low-income families that cannot or just barely cover the needs of the whole family with their own income or assets - it is aimed at ensuring a minimum standard of living for the family. Moreover, its award is based on objective criteria defined by law. In addition, it is paid as a supplement to *Kindergeld*, which as a social security benefit is covered by Article 3(1) Regulation (EC) No 883/2004. As the *Kinderzuschlag* is a need-based and income-dependent benefit, it is linked to the socio-economic context of the country concerned and the amount set by law takes into account the average standard of living in the country concerned. Furthermore, it is paid out of public funds and contributions are not used to finance it. Against this background, Germany rightly classifies the *Kinderzuschlag* as a special non-contributory benefit (assistance). In these cases, the objective pursued would be lost if this benefit had to be granted outside Germany.

Currently, the German *Kinderzuschlag* is not listed in Annex X of Regulation 883/2004. The *Kinderzuschlag* - as described above - qualifies as a special non-contributory benefit and meets the conditions of Article 70(2)(a) and (b) of the Regulation but not subparagraph (c) (inclusion in Annex X). In terms of legal certainty and foreseeability, it would be desirable for Germany to request the inclusion of the *Kinderzuschlag* in Annex X as soon as possible so that it is clear that these assistance benefits are not exportable and beneficiaries living abroad do not (or no longer) receive them. However, it is the Community legislator who ultimately decides on this.

Adjustment of MISSOC tables with respect to *Kinderzuschlag*

As of 1 July 2022, Germany has changed its national qualification - under European social security law - of the *Kinderzuschlag*. Indeed, as of the said date, Germany no longer considers this benefit to be a *family* benefit but a social benefit, as a result of which Germany is no longer obliged to export these benefits.[52] However, this changed view has not yet been included in the Mutual Information System on Social Protection (MISSOC) tables. Indeed, in the 1 January 2023 version, *Kinderzuschlag* is still listed under 'Family benefits', while Germany no longer qualifies it as such. This needs adjustment by Germany, also for the sake of legal certainty.

[52] See also preamble para 37 Regulation (EC) No 883/2004.

Better disclosure towards foreign competent authorities and beneficiaries

To our knowledge, the change in qualification on the part of the German authorities of the *Kinderzuschlag* to supplementary allowance (special non-contributory benefit) was not clearly communicated to the Dutch Social Insurance Bank (SVB), nor to beneficiaries living abroad. As of 1 July 2022, the export of these benefits to beneficiaries living abroad has ceased. This is undesirable in view of the drop in income and the lack of sufficient action perspective on the part of foreign beneficiaries. All the more since that *Kinderzuschlag* looks at income support aimed at low incomes, it should be avoided in the future. A clear provision of information towards foreign social security institutions and foreign beneficiaries is essential in these cases.

In general, it can be said that in order to resolve cross-border obstacles, a cross-border coordination point is needed. Such a cross-border coordination point is a contact point responsible for collecting obstacles, coordinating and supporting the implementation of a solution and implementing the established procedures. The idea follows from the European Commission's announced *Border Focal Point* at the European level.[53] This Border *Focal Point* should assess the Commission's actions on the cross-border dimension, provide support on obstacles and exchange experiences and good practices.

It is conceivable that in the future, further investigation will also be devoted to an also German policy-related - at first sight far-reaching - social security reform: the introduction of a so-called *Kindgrundsicherung* with effect from 2025. Similar questions to those raised with regard to the present amendment and previous subjects of the Cross-Border Impact Assessment can be asked in this regard. From an ITEM point of view, the most important take-away is: no adverse(r) consequences for cross-border workers compared to residents, both financially and from an administrative point of view.

[53] European Commission, Communication 'Boosting growth and cohesion in EU border regions', COM(2017) 534 final, p. 6.

Annex I: conditions for granting *kindgebonden budget* and *Kinderzuschlag*

Netherlands: conditions child budget

Child Budget Act

Art. 2 - Entitlement and amount of child budget

1. A parent is entitled to a child budget for a child for whom child benefit is paid to that parent under Section 18 of the General Child Benefit Act.

General Child Benefit Act

Art. 7

1. The insured person is entitled to child benefit in accordance with the provisions of this Act for a child under 18 years of age who:
    a. Belongs to his household, or
    b. Is maintained by him

Art. 7b

1. The insured person is not entitled to child benefit for the benefit of the child if that child does not live in the Netherlands on the first day of a calendar quarter.
2. Paragraph 1 shall not apply if, on the first day of a calendar quarter, such child resides in a country in which there is an entitlement to child benefit for him under Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJEU L 166).

Art. 6

1. Insured in accordance with the provisions of this Act is the person, who
    a. Is a resident;
    b. Is not a resident, but is subject to wage tax in respect of employment in the Netherlands or on the continental shelf.

Art. 2

Resident within the meaning of this Act is a person who lives in the Netherlands.

Germany: conditions *Kinderzuschlag*

§6a Bundeskindergeldgesetz - Kinderzuschlag

Paragraph 1: persons receive a Kinderzuschlag for those children (unmarried, and not yet 25 years old) belonging to their household if:

- They are entitled to Kindergeld for these children under this Act (Bundeskindergeldgesetz) or under Section 10 Einkommensteuergesetz or are entitled to other Leistungen within the meaning of §4 Bundeskindergeldgesetz.

Durchführungsanweisung zum Bundeskindergeldgesetz - Allgemeines

Eltern, die nach § 1 EStG unbeschränkt einkommensteuerpflichtig sind oder derart behandelt werden, haben Anspruch auf Kindergeld nach dem X. Abschnitt des EStG (vgl. hierzu §§ 62 bis 78 EStG). 2 Im BKGG sind deshalb nur Kindergeldansprüche von Eltern geregelt, die wegen Bestehens lediglich beschränkter Einkommensteuerpflicht keinen Anspruch auf Kindergeld nach dem EStG geltend machen können, aber wegen der verfassungsmäßig gebotenen Förderung der Familie (cf. Art. 6 GG) gleichwohl Kindergeld erhalten sollen. 3 Begünstigt werden dabei solche Personen, die in einer Weise mit dem deutschen Sozial-, Dienst- oder Arbeitsrechtssystem verbunden sind, die eine Kindergeldgewährung erforderlich oder angemessen erscheinen lässt.

Kindergeld o.g. Einkommensteuergesetz (EStG):

Section 10 Einkommensteuergesetz: Kindergeld

- §62: Anspruchsberechtigte:
  1. For children within the meaning of §63, there is an entitlement to Kindergeld for the one:
     1. Who has a domicile or habitual residence in Germany.
     2. Without residence or habitual abode in Germany:
        i. Subject to unlimited tax liability under §1(2), or
        ii. Treated as such under §1(3).

Section 1 Einkommensteuergesetz: Steuerpflicht

- §1: Steuerpflicht
  1. Natural persons having a residence or habitual abode in Germany are subject to unlimited tax liability.
     i. ...
     ii. ..
  2. Unlimited tax liability also includes German citizens who
     i. Have neither a domicile nor habitual residence in Germany and
     ii. Have an employment relationship with a domestic public law legal entity and receive wages for it from a domestic public law fund.
  3. Upon request, individuals who have neither a residence nor a habitual abode in Germany also become subject to income tax without limitation, provided they have domestic income within the meaning of §49. This only applies if at least 90% of their income in the calendar year is subject to German income tax or if the income not subject to German income tax does not exceed the basic deduction according to §32a paragraph 1 sentence 2 number 1.

4. Natural persons who are neither domiciled nor habitually resident in Germany are, subject to paragraphs 2 and 3 and §1a, subject to limited tax liability if they have domestic income within the meaning of §49.

Kindergeld on the basis of Bundeskindergeldgesetz (BKGG):

§1 Anspruchsberechtigte

1. Child allowance under this Act for his/her children receives the person who is not subject to unlimited tax liability under §1 (1) and (2) of the Einkommensteuergesetz, nor treated as such under §1 (3) of the Einkommensteuergesetz and:
    1. Are in a Versicherungspflichtverhältnis zur Bundesagentur für Arbeit under Book 3 of the Civil Code or versicherungsfrei under §28 paragraph 1 number 1 Book 3 of the Civil Code; or

4. Children for whom another person is entitled to Kindergeld under the Einkommensteuergesetz do not count. ...
5. Children who have neither domicile nor habitual residence in Germany are not taken into account. This does not apply to children who, pursuant to §1 paragraph 1 number 2 and 3, are included in the household of the entitled person or ....
6. ..

Versicherungspflichtverhältnis on the basis of Sozialgesetzbuch Drittes Buch

§24: Versicherungspflichtverhältnis

1. In a versicherungspflichtverhältnis are persons, who are versicherungspflichtig due to being an employee or for other reasons.

§25: Beschäftigte

1. Insured persons are those who are employed for wage/remuneration or who are employed for their (professional) education.

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