Maastricht University

Institute for Transnational and Euregional cross border cooperation and Mobility / ITEM

Cross-border impact assessment 2016

Dossier 1A: Tax Treaty Germany-Netherlands

Labour

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Cross-border impact assessment 2016

Dossier 1A: Tax Treaty Germany-Netherlands: Labour

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1. Introduction

The following cross-border impact assessment report analyses the effects of the new tax treaty (hereinafter: new tax treaty) between Germany and the Netherlands, which recently entered into force on 1st January 20161. The focus of the impact assessment is based on the changes that can be found in the new tax treaty relating to current frontier workers and pensioners that used to work across borders. In this respect it should be mentioned that one of the Netherland's major concerns in regard to the old tax treaty, was the unfavourable situation of Dutch resident frontier workers working in Germany.[2]

Tax treaties are typically concluded between states that have strong economic, financial and political cooperation. In the given case Germany and the Netherlands do not only have strong relations with each other, but are also in a geographical proximity, being direct neighbours.[3] This close relationship prompts many questions concerning cross-border work and cross-border pensions.

The new tax treaty was signed on 12th April 2012 in Berlin. It replaces the old double tax treaty from 16th June 1959, which was concluded in Den Haag (hereinafter: old tax treaty). Underlying interests for the negotiations of a new tax treaty were essentially that the old tax treaty did not meet the standards set forth by the OECD Model Convention.[4] The old tax treaty with Germany dated back to 1959 and was one of the oldest tax treaties the Netherlands concluded after the tax treaty with Malawi. Additionally, the old tax treaty did not reflect the recent economic ties between the two states anymore, therefore a change was inevitable.[5]

Apart from those common interests both states shared, the Netherlands as well as Germany had also their own for the new treaty. For Germany the main interest was to prevent improper use of the tax treaty.[6] In contrast, for the Netherlands the main concern was to strengthen the fiscal situation of Dutch resident frontier workers[7] – which shall be investigated in this report – and a better fiscal position for Dutch resident pension funds.[8]

In relation to frontier workers for the Netherlands particular a compensations scheme and the conditions of the German 'Splittingverfahren' for Dutch resident cross-border workers were of

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[1] Bundesgesetzblatt Jahrgang 2012 Teil II Nr. 38; Tractatenblad van het Konikrijk der Nederlanden Jaargang 2012, No 123.

[2] In this respect there is a pragraph in the parlamentary memoire that mentions the explicit aim in the negotiations for the new tax treaty to consider the situation of frontier workers (see *Kamerstukken II* 2013/14, 33 615, nr. 3 (MvT), subsection I.4 Grensarbeiders). This paragraph was inserted in accordance with the concessions made from the former state secretary for finances de Jager to include explicit considerations on the effects the new tax treaty would have on frontier workers (see for that Kabinetsstandpunt met betrekking tot de aanbevelingen van de Commissie grensarbeider, 9 januari 2009, BCPP 2008/2455 met verwijzing naar *Kamerstukken II* 2000/01, 26 834, nr. 5); whereas the Netherlands was concerned main with frontier workers, Germany was more concerned about cross-border investment structures and abuse of treaty benefits.

[3] Is explicitly mention in *Kamerstukken II* 2013/14, 33 615, nr. 3 (MvT), section I.1; for the strong relationship see Statistisches Bundesamt, Statistisches Jahrbuch 2011, p. 474.

[4] *Kamerstukken II* 2013/14, 33 615, nr. 3 (MvT), onderdeel I.1.

[5] See Deutscher Bundestag, 17. Wahlperiode, Gesetzentwurf der Bundesregierung, Drucksache 17/10752, A. Problem und Ziel.

[6] *Kamerstukken II* 2013/14, 33 615, nr. 3 (MvT), onderdeel I.1. Denk hierbij met name aan *treaty shopping,* waarbij een inwoner van een derde land zich via kunstmatige constructies toegang verschaft tot een voordeel uit het belastingverdrag.

[7] *Kamerstukken II* 2013/14, 33 615, nr. 10, p. 1-2; *Kamerstukken II* 2010/11, 25 087, bijlage bij nr. 7, paragraaf 2.14.

[8] *Kamerstukken II* 2013/14, 33 615, nr. 3 (MvT), onderdeel I.1.

vital importance. A compensation scheme was already put in place in the Dutch-Belgian tax treaty in 2001. Based on this example negotiations were aimed at implementing a similar scheme to offset higher paid taxes and social security in Germany, in situations where it is not possible to take into account benefits available in the Netherlands.

This cross-border impact assessment investigates in how far the new tax treaty changes the situation of frontier workers and which potential effects it may have. However, it must be noted that there is a general transition period of one year, which enables taxpayers to follow the old tax treaty provisions up to January 2017.[9] This already indicates one of various limitations this impact report faces. Since frontier workers may opt for continuing to apply the old treaty, only very few that benefit from the treaty will make use of it. This makes available data and expertise scarce and hard to acquire.

2. Objective of the Research, Definitions, Subject, Indicators

2.1 Effects today or in the Future, Objective: Ex-Post or Ex-Ante

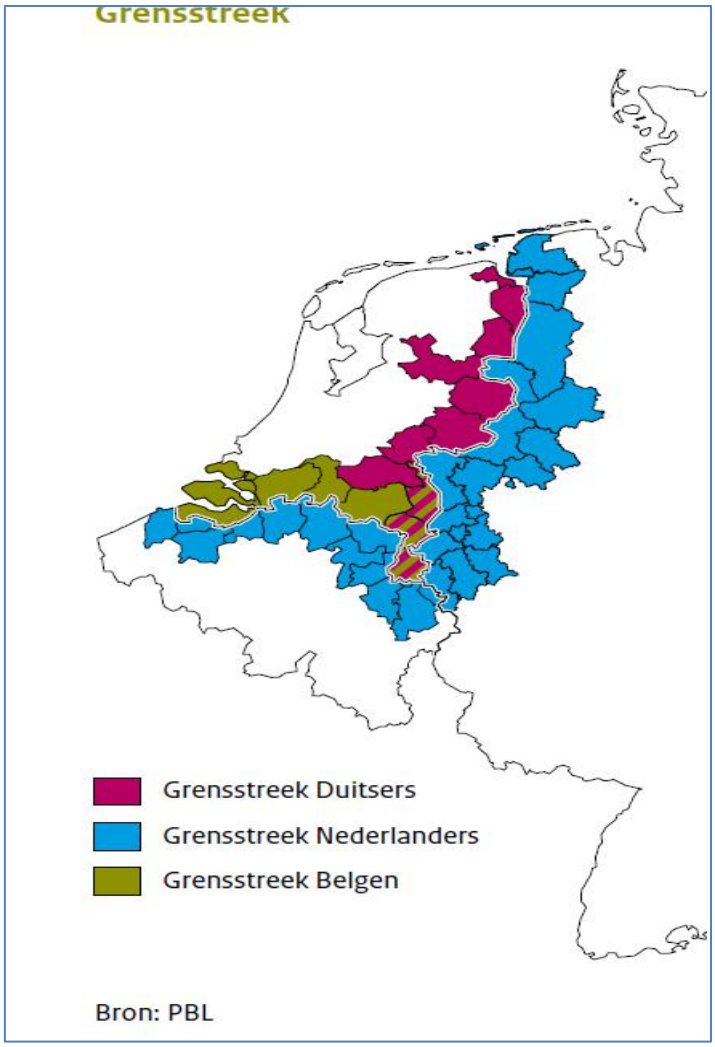
The cross-border impact assessment shall deliver a contribution in form of an ex-post analysis of the negative cross-border effects from the new tax treaty between Germany and the Netherlands, which entered into on the 1st of January 2016. Since the treaty has been in force only for a short period of time, there are none or only very little effects for the cross-border region measurable. In addition, difficulties in measuring the effects of the new treaty arise due to the general transitional provision in the treaty, which allows the application of the old treaty from 1959 for the entire year 2016. This transition period, along with the lack of awareness among frontier workers about the changes in the new tax treaty, prevent an elaboration on real effects caused by the new tax treaty. Therefore, definite effects in relation to frontier workers can only be measured as from the end of 2018 once the transition period is over and first statements have been delivered and then also only with the help of collected data.

Taking into account these above mentioned limitations an intended ex-post evaluation cannot be realised at this stage. However, the changes for frontier workers in the new tax treaty and a potential outlook can be highlighted based on available calculations provided for frontier workers by the Dutch parliament, which represents a de facto ex-ante projection for the coming years using past data. Those predictions can in turn be intensified, reinforced or opposed in following impact assessment.

[9] Art. 33, lid 6 van het verdrag: *"Niettegenstaande het tweede en derde lid, indien een persoon uit hoofde van de Overeenkomst van 1959 recht zou hebben op grotere voordelen dan uit hoofde van dit Verdrag, blijft de Overeenkomst van 1959 naar keuze van een dergelijke persoon met betrekking tot deze persoon volledig van toepassing gedurende een tijdvak van één jaar, te rekenen vanaf de datum waarop de bepalingen van dit Verdrag van toepassing zouden zijn uit hoofde van het tweede lid."*

2.2 Effects on which Geographical Area? Definition of the 'Cross-border Region

The effects that are analysed in this report refer to the German-Dutch border strip. Active workers are employed within an area of a distinct distance towards the border, which are defined by political units (such as Landkreise, Gemeenten, Arrondissements etc.). In the figure below is an illustration of the German-Dutch border-line. The Dutch-Belgian border strip is for the purpose of this assessment excluded.



To illustrate the relevance of the cross-border issues the following section provides some numbers in relation to cross-border workers. However, it must be pointed out that the necessary data for the cross-border impact assessment lacks proper collection. Therefore, only currently publicly available data can be presented. The accuracy of those data may be questionable and in some instances rather appear estimated than precise, especially in cases where there are only round numbers available. A suggestion, which should already be made at this point is that

continuing and appropriate monitoring of frontier worker activities is necessary in order to acquire a representative picture of impacts legislative changes have on them.

As explained above, data in relation to frontier workers are rare and possibly not very accurate. Across the EU there were approximately 1.1 Million cross-border workers in 2014, according to an estimation by the European Commission.[10] Those estimations suggest that the number of cross-border workers within the EU has increased by 41% as compared to the numbers available in 2006. For the specific region Euregio Maas-Rhein, Euregio Rhein-Waal, Euregio Rhein-Maas-Nord, and Euregio Rhein-Waddenzee in 2006/2007 the number of cross-border commuters in total result an estimation of 35,692 according to the Commission Report (See table 1).[11]

Table 1: numbers of Cross-border commuters DE-NL 2006/2007

Name of Eures Region	**Number of Cross-Border Commuters 2006/2007**
Rhein-Waddenzee Germany – Netherlands	9,194
Euregio Rhein-Waal & Euregio Rhein-Maas- Nord Germany – Netherlands	17,626
Euregio Maas-Rhein Belgium – Germany – Netherlands	8,872
Total	35,692

Source: Annex of European Commission D Employment and Social Affairs, Report 2008, pp. 16-17

More recent data for active cross-border workers can be found in various publications surrounding data gathered by the Centraal Bureau voor de Statistiek (CBS). However, comparing the numbers of the CBS and what has been published by the European Commission, the available the data varies significantly. In the above mentioned Commission Report, the total number of cross-border commuters' amount in total to 35.692 in the year 2006/2007. In 2009 CBS published a paper that suggests already 40.000 – 49.000 frontier workers from early 2007 until late 2007 considering only German residents that work in the Netherlands. This result implies a much higher number of cross-border workers.[12] Deviations in respect of the numbers publicly available can easily be explained by the differing approaches to collect the data. Thus, one important suggestion for future assessments is to establish a coherent approach towards the gathering and monitoring of frontier workers. Coherence in data collection enables a more representative

[10] Michele Alessandrini c.s., Labour mobility and Local and Regional Authorities: benefits, challenges and solutions, 2016, p.40; European Commission (2015), 'Comparative report – Frontier workers in the EU', p. 9; European Commission (2014), 'Labour mobility within the EU',p. 4; Eurostat, LFS, 2012.

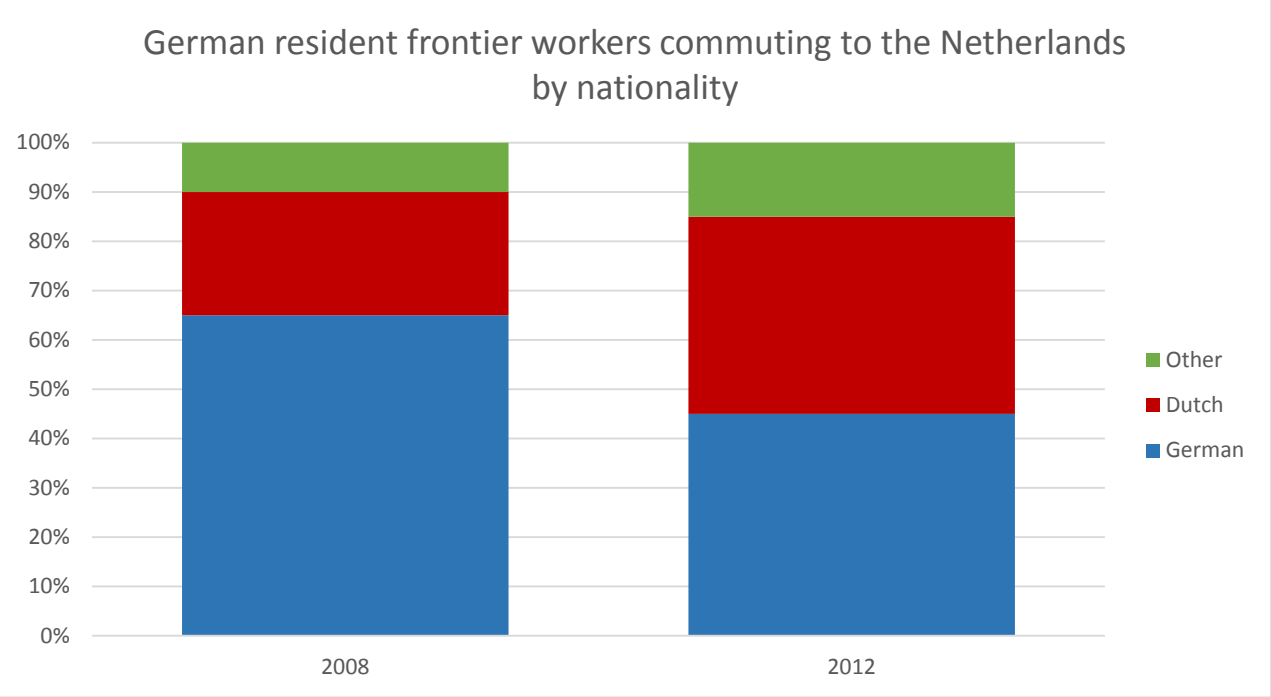
[11] AEBR (2012), Overall Report -Information services for cross-border workers in European border regions, p. 30-31 from: http://borderpeople.info/wp-content/uploads/2014/10/aebr_cb_information_provision.pdf; European Commission D Employment and Social Affairs: Scientific Report on the Mobility of Cross-border Workers within the EU-27/EEA/EFTA countries, 2008 Annex, p. 16-18.v

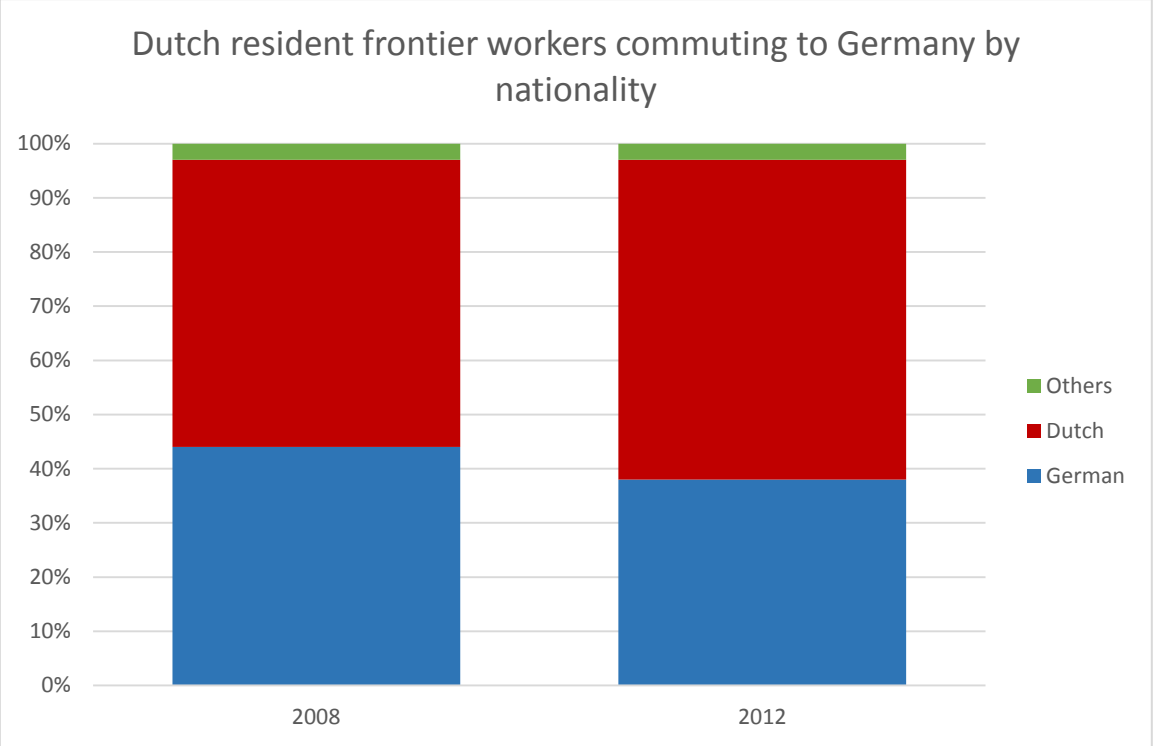
[12] Corpelijn, A. (2009), Grensoverschrijdende Arbeid: Werken in Nederland, Wonen in het Buitenland. CBS, Sociaaleconomische trends 4e kwartaal 2009, p. 45.

analysis that helps a future evaluation of increasing or decreasing cross-border mobility and in this respect also the success of the European integration project.

The following two graphs compare the development in nationalities as concern Dutch and German frontier workers of 2008 and 2012.

Source: CBS 2014; Taken from CBS 2015 Arbeidsmarkt zonder grenzen, p. 19 and amended.

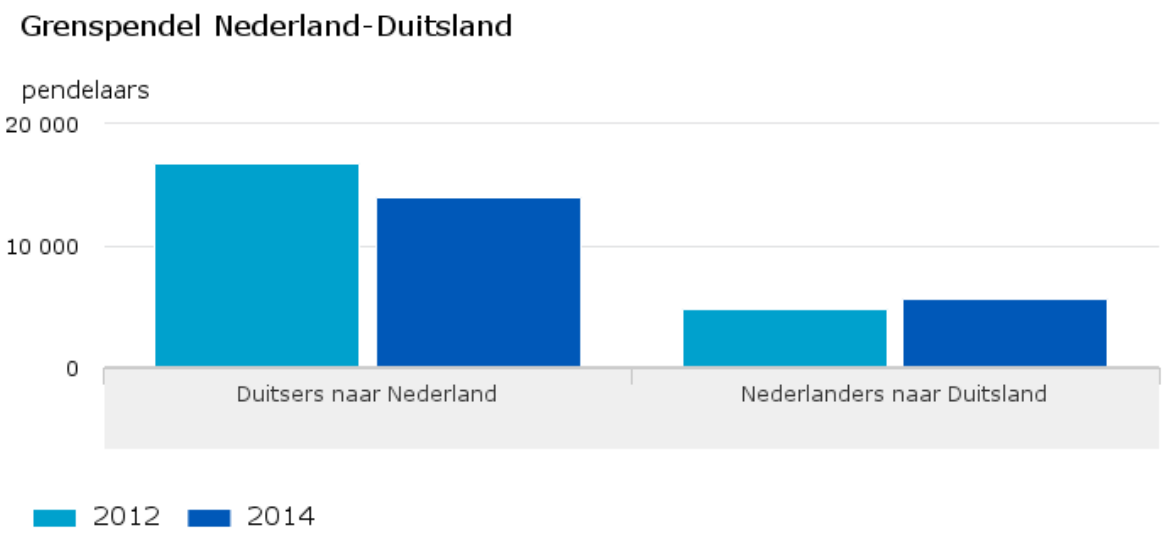




Source: Kruispuntbank 2014, RSZ 2014; IAB 2014; Take from CBS 2015 Arbeidsmarkt zonder grenzen, p. 23 and amended.

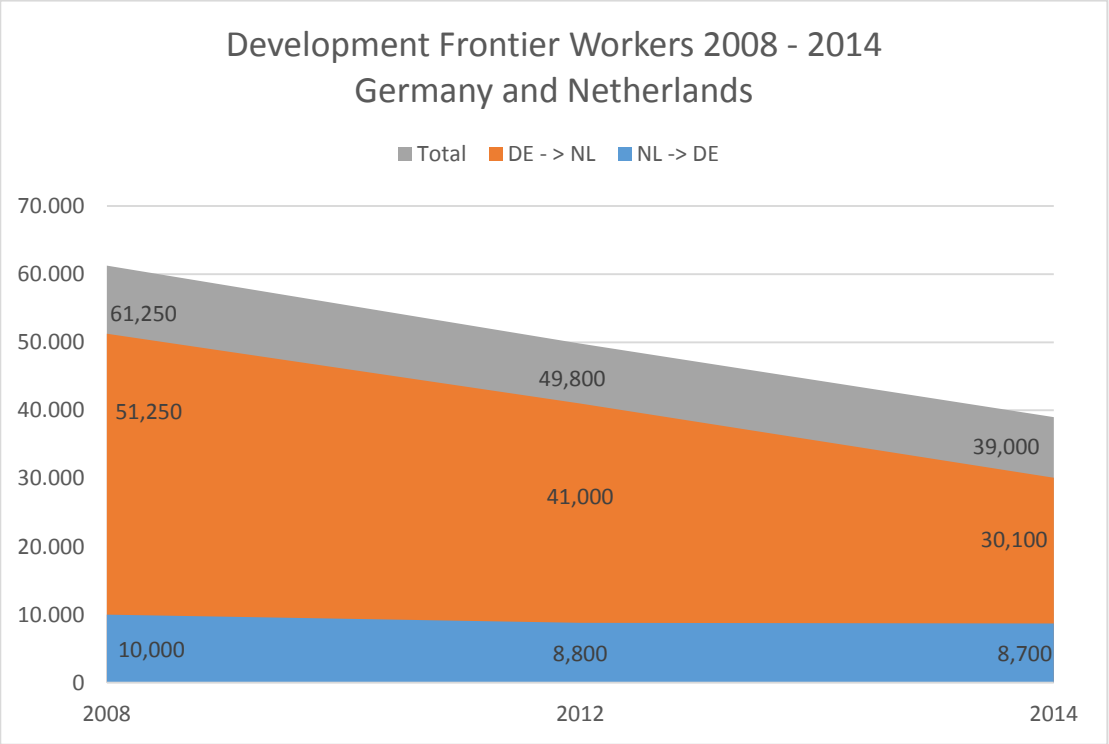
The newest publication of the CBS from 15th September 2016[13] (see figure below) shows a comparison of the numbers of German nationals working in the Netherlands and Dutch nationals working in Germany between 2012-2014. According to the figure on the website, there is an increase (by 819) of Dutch nationals working in Germany resulting in 5689 Dutch nationals and a decrease (by 2,877) of Germans working in the Netherlands that leaves 13961 German nationals.

[13] https://www.cbs.nl/nl-nl/nieuws/2016/37/meer-duitsers-pendelen-naar-nederland-dan-andersom



Bron: IAB, PBL, CBS

As concerns the total numbers of frontier workers we used the available data from CBS in order to provide a good overview. Therefore, all the data found, has been gathered together and resulted in the figure below, which shows the amount of frontier workers between Germany and the Netherlands between 2008 and 2014.



Source: Internationaliseringsmonitor 2016 – Derde kwartaal, p. 24; CBS 2015 Arbeidsmarkt zonder grenzen, p. 18, 22, 33; Feiten en Cijfers / Zahlen und Fakten, Overijssel-Duitsland in de grensstreek, 8 februari 2016, p. 26; Maatwerktabel - Grenspendel en migratie at https://www.cbs.nl/nl-nl/nieuws/2016/37/meer-duitsers-pendelen-naar-nederland-dan-andersom

Whereas it can clearly be observed that there is an overall decrease of frontier workers between Germany and the Netherlands from over 60,000 to below 40,000, this change is mostly caused by drastic decline of workers resident in Germany and working in the Netherlands. In general, the main reasons for people that work in the Netherlands and reside in Germany, are less concerned with the cross-border job market, but rather include the more attractive housing market, a better fiscal climate or personal reasons.[14]

[14] Internationaliseringsmonitor 2016 – Derde kwartaal, p. 25; http://www.noz.de/deutschland-welt/niedersachsen/artikel/780083/mehr-pendler-zwischen-niedersachsen-und-den-niederlanden; http://www.noz.de/lokales/papenburg/artikel/611679/niederlander-zieht-es-ins-nordliche-emsland#gallery&0&0&611679.

2.3 Cross-Border Effects on? What are the Focus Points of the Research, The Principles, Benchmarks and Indicators

2.3.1 Dossier: Tax Treaty Germany – Netherlands and effects on? What is the main Focus, the main points of Research?

The focus point of this impact assessment lies on the effects of cross-border situations from the perspective of citizens, associations and companies in the light of the objectives and principles of the European integration project (freedoms, citizenship and non-discrimination). Of particular relevance are the cross-border effects from the perspective and fiscal position of citizens/taxpayers.

2.3.2 Dossier: Tax Treaty Germany – Netherlands – What are the Principles, Objectives and Benchmarks for a Positive Situation in the Cross-border Region

Principles	Benchmarks	Method
International Law: a. Rationale of tax treaty: prevention of juridical double taxation. b. Art. 24 OECD-Model Convention and Commentary → non-discrimination.	No juridical double taxation: one object (income from employment) and one subject (frontier worker) are taxed by two states.	Investigate under which circumstances the new tax treaty results in double taxation or double non-taxation (in this respect having regard also to domestic legislation and guidance for the interpretation provided by domestic authorities).[15]
Work: Free movement of workers Art. 45 TFEU and Art. 7(2) of Regulation 492/2011/EU: no fiscal discriminatory treatment of frontier workers.	The fiscal position of the Dutch frontier worker under the old as well as the new tax treaty. The Fiscal Position of a German frontier worker under the old and the new tax treaty.	A general comparison of the changes between the old and the new tax treaty that affecting frontier workers. Concerning in particular the common cross-border employees, making general projections about possible net salary changes.

[15] Bijvoorbeeld de doorwerking van de Nederlandse nettopensioenregeling onder het nieuwe belastingverdrag.

3. Does the New Tax Treaty Foster or Limit European Integration and what does it imply for the Population of the Cross-Border Region?

In the following subsections it is outlined in how far the new tax treaty may promote European integration and what that implies for the citizens in the cross-border region. As mentioned in paragraph 2.3., this analysis shall be based on the principles, benchmarks and indicators described above. Starting point, or rather benchmarks, for this are the changes for the fiscal position of the active Dutch frontier worker under the old and new tax treaty on the one hand and the retired frontier worker on the other hand. In other words, the investigation will show in how far the tax situations have changed for both categories of frontier workers. This ex- ante (early stage ex-post) overview is based on the changes in the new tax treaty and potential income projections as they were expected to work out before the treaty entered into force, which serve as indicators. With the help of information currently available an assessment of income projections shall enable an evaluation of the possible cross-border effects the new tax treaty has in some general situations. From the income projections the increase or decrease of the net salary or net pension – not to be confused with 'nettopensions' – shall become visible. On hand of those results, preliminary conclusions can be drawn, which indicate potential obstacles for cross-border work.

At this point it should be stressed again that there is no exact data available about the increase or decrease in numbers of frontier workers/ retired frontier workers over the period between 2014-2016. In the future better opportunities to assess the impact the new tax treaty has on cross-border work and pensions should arise, when careful monitoring takes place.

3.1 Changes applicable for active frontier workers and retired frontier workers

3.1.1 Non-discrimination in respect of the 'Splittingverfahren'

For the changes that are investigated in this impact assessment, the non-discrimination principle plays a vital role and therefore it is taken into account in how far compliance with it has been improved. In the new tax treaty, the non-discrimination principle is laid down in Art. 24, which is drafted after Art. 24 of the OECD Model Tax Convention and also reflects the Dutch treaty policy for the negotiations of the new tax treaty.[16]

[16] Zie Notitie Fiscaal Verdragsbeleid 2011.

The new treaty text of Art. 24 reads as follows:

1.Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.

2.Stateless persons who are residents of a Contracting State shall not be subjected in either Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of the State concerned in the same circumstances, in particular with respect to residence, are or may be subjected.

3.The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

4.Except where the provisions of paragraph 1 of Article 9, paragraph 4 of Article 11, or paragraph 4 of Article 12, apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State.

5.Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

6.Contributions paid by, or on behalf of, an individual exercises employment or self-employment in a Contracting State to a pension plan that is recognised for tax purposes in the other Contracting State will be treated in the same way for tax purposes in the first-mentioned State as a contribution paid to a pension plan that is recognised for tax purposes in that first-mentioned State, provided that

a) such individual was contributing to such pension plan before he exercises employment or self-employment in the first-mentioned State; and

b) the competent authority of the first-mentioned State agrees that the pension plan generally corresponds to a pension plan recognised for tax purposes by that State.

For the purpose of this paragraph, "pension plan" includes a pension plan created under a public social security system.

7.The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.

A change that can be attributed to the non-discrimination principle is found in Art. XVI, first paragraph of the protocol complementing the new tax treaty.

The new text of the protocol reads as follows:

> 1. The limitations of the second sentence of subsection 3. of section 1 in conjunction with subsection 2. of section 1a of the German Income Tax Act (Einkommensteuergesetz, EStG) shall not be applied to spouses resident in the Netherlands. This shall presuppose that the spouse liable to tax in the Federal Republic of Germany personally fulfils the preconditions of subsection 3. of section 1 of the Income Tax Act.
>
> 2. Paragraph 5 of Article 24 does not prevent a Contracting State to limit income taxation on a consolidated basis ("Organschaft" or "fiscale eenheid") to persons who are residents of that state or permanent establishments in that state.

In this provision Germany makes concessions for Dutch residents that have income from Germany (from employment or pensions). Those concessions are expressed by a simplification for the application of the 'Splittingverfahren', in Art. 1(3) of the EStG. On the basis of this 'Splittingverfahren' married couples can under certain conditions be assessed together for the German income tax. For this, the tax liability is calculated on half of the income taken together from both spouses. Accordingly, the calculated income tax liability is based on each half. This results in an advantage in terms of progression.

The most significant requirement for non-residents of Germany, that are liable to tax in Germany, used to be that at least 90% of the income of both spouses have to liable to tax in Germany in order to be eligible for the 'Splittingverfahren' or that the in Germany taxable income does not exceed the 'Grundfreibetrag' of €17.304. [17]

The simplification provided in the new tax treaty consists in a detachment of the 90% and the absolute income requirement of both spouses.[18] In this respect, it is only necessary that one spouse that is taxable in Germany is personally fulfilling the requirements. Thus, if one of the spouses complies with the 90% condition or the absolute income requirement, the entire income of both spouses can be taken together for the more favourable treatment in progression on the basis of the 'Splittingverfahren'.

This new favourable treatment makes it possible for one of the two spouses to earn additional income outside of Germany (e.g. in the Netherlands) and still profit from the 'Splittingverfahren' in Germany.[19] In certain cases the application of the German 'Splittingverfahren' can have remarkable positive influences on the tax pressure in Germany. Considering that the income from the spouse working in the Netherlands, would exceed the 90% threshold, the income of the main wage earner then faces a relatively higher tax burden and that requires a higher compensation in

[17] Par. 1, lid 3 jo. par. 1a, lid 2 jo. par. 32a, lid 1, sub 2, nummer 1 EStG.
[18] In artikel XVI, lid 1 van het Protocol bij het verdrag worden de beperkingen van de tweede volzin van artikel 1, lid 3, jo. artikel 1a, lid 2, van de Duitse wet op de inkomstenbelasting ("Einkommensteuergesetz") niet van toepassing verklaard op echtgenoten die in Nederland wonen.
[19] *Kamerstukken II* 2013/14, 33 615, nr. 3 (MvT), onderdeel II.24 Non-discriminatie.

order to ensure equal treatment between neighbours in the Netherlands. [20] With the introduction of the simplification of the 'Splittingverfahren', Germany makes its contribution to guarantee 'equality at the workplace' and fosters in this respect non-discrimination.

However, Germany was not willing to ensure complete equality at the workplaces, as only a simplification of the 'Splittingverfahren' was granted. No concessions were given in relation to other personal allowances, such as other deductions laid down in German regulations relating to the family, that are granted in Germany.[21] Considering the complexity of such a pro-rate parte basis Germany does not intend to eliminate all the obstacles. Germany thinks that with the changes made, which were mentioned above, it fulfilled its obligations in respect of fiscal treatment of frontier workers, taking into account the judgements of the CJEU.[22]

3.2 Changes in the Area of Frontier workers

In this section the, for the impact assessment, relevant changes in the new tax treaty concerning the allocation of taxation rights for active frontier workers are compared to the old treaty. First, the new general provision on taxation of employment income is outlined. Although the new provisions concerning the allocation of taxation rights in relation to income from employment have not changed to a great extent some changes in particular concerning the allocation rules for director's fees and personnel aboard ships and aircrafts in Arts. 14[23] and 15[24] and minor changes in relation to artists and sportsmen as well as docents and professors can be observed. The greatest changes for Dutch frontier workers can be found in the protocol added to the treaty and relate to the new compensation scheme and the above mentioned new conditions for the splitting tariff. Each of the changes is shortly discussed below, however, the focus for discussed calculations provided by the Dutch parliament is going to be on some general situations of frontier workers only.

3.2.1 General Provision for Taxation of Employment Income in Art. 14

In the new tax treaty the general provision for taxation of employment income is found in Art. 14. The provisions in the new tax treaty changed to a certain extend and correspond to mostly to Art. 10 of the old tax treaty. For the overview of this provision both Art. 10(3) of the old and Art. 14(4) of the new tax treaty are not dealt with here, as there is a separate section dealing especially with the changes therein.

[20] M.G.H. Schaper en R.G. Prokisch, *Onderzoek naar een algemene compensatieregeling voor Nederlands-Duitse grenswerknemers,* Univeriseit Maastricht 2009, p. 30.
[21] *Kamerstukken II* 2013/14, 33 615, nr. 3 (MvT), onderdeel I.4 Grensarbeiders. Een dergelijke bepaling is overigens wel opgenomen in art. 26, lid 2 van het belastingverdrag met België.
[22] HvJ EG 14 februari 1995, C-279/93, *ECLI:EU:C:1995:31* (Schumacker).
[23] Tweede Kamer, vergaderjaar 2012–2013, 33 615, nr. 3, p. 23.
[24] Ibid, p. 25

The old tax treaty text of Art. 10 reads as follows:

1. Where an individual who is a resident of one of the States derives income from employment, the said income shall be taxable in the other State, if the employment is exercised in that State.

2. Notwithstanding paragraph 1, income derived from employment shall be taxable solely in the Contracting State of which the employed person is a resident if:

(1) he is present in the other State temporarily, for a total of not more than 183 days in one calendar year;

(2) the remuneration for his employment activities during that time is paid by an employer who is not a resident of the other State; and

(3) the remuneration for his work is not borne by a permanent establishment or fixed base which the employer has in the other State.

The new treaty text of Art. 14 reads as follows:

1.Subject to the provisions of Articles 15, 17, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2.Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

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

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

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

3.Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment which an individual who is a resident of one of the Contracting States which is borne by a fixed place of business, situated in a cross-border economic area and through which the common border between the Contracting State runs, shall be taxable only in the State of which the individual is a resident, unless under Council Regulation (EEC) No 1408/71 of 14 June 1971, Council Regulation (EC) No 883/2004 of 29 April 2004, or under a regulation of the European Union which substitutes them following the signature of this Convention, this individual is subject to the legal provisions of the other State. If under Council Regulation (EEC) No 1408/71 of 14 June 1971, under Council Regulation (EC) No 883/2004 of 29 April 2004, or under a regulation of the European Union which substitutes them following the signature of this Convention, the individual is subject to the legal provisions of the other State, this remuneration may be taxed in that other State.

In a direct comparison between the old Art. 10 provision and the new Art. 14, some changes become obvious. First, the wording of the new Art. 14 has been in conformance with the Art. 15 of the OECD MC. Especially the hierarchical order between Art. 14 and Arts. 15, 16, 17, and 18 has been clarified. In addition, another change is expressed in the calculation period for the 183 days threshold in Art. 14(2)(a), which in the new tax treaty considers any twelve month period instead of a calendar year according to the old tax treaty. As a consequence, the new period for the calculation of the 183 days in order to maintain taxation in the residence state does not consider the end of a calendar year anymore, but starts with any day of work activity in the country. Form that day a twelve month period is taken into account in order to determine the days worked in the other contracting state. This new calculation period is in accordance with the approach used in the OECD Model Tax Convention.

The new third paragraph of Art. 14 represents the formal implementation in the new tax treaty of the third protocol added to the old tax treaty. It concerns the taxation of workers that work on cross-border business premises. In such cases the procedure of Regulation 883/2004/EC is followed and means that taxation shall take place in the state where the worker is socially secured.[25]

One particularly interesting sector that was neither mentioned, nor was dedicated a new provision in the new tax treaty concerns the taxation of cross-border truck/lorry drivers and the fiscal consequences of their income. Due to the fact that truck drivers often work in multiple jurisdictions they have to deal with various tax law jurisdictions and double tax treaties, it is difficult to determine how to allocate which part of the income to which jurisdiction for the purpose of taxation.[26] The Belgian Supreme Court[27] classifies truck drivers under the provision laid down in Art. 14(4) and equates them with personnel aboard ships and aircrafts. However, the German and the Dutch courts do not follow such a perspective. They rather follow the approach that the truck driver should be taxed where he performed the work and respectively also the income should be allocated to that country.[28] The new tax treaty could have been a good momentum to insert a specific clause for truck drivers, nevertheless the provisions adopted in the new tax treaty remain silent about the tax treatment of truck drivers.

3.2.2 Changes for Director's Fees in Art. 15

One significant change that affects cross-border employment of frontier workers is the new Art. 15 of the new tax treaty on the allocation of taxing rights for directors' fees. Formerly there was only paragraph 4 of Art. 9 that dealt with allocation of taxing rights of income from board members, but only concerning the supervisory board.

[25] Tweede Kamer, vergaderjaar 2012–2013, 33 615, nr. 3,p. 23; Drucksache 17/10752, p. 58.
[26] Weerepas, M. (2011), NTFR-B 2011/13 Notitie Fiscaal Verdragsbeleid: arbeidsartikelen, part 2.3, p. 3.
[27] Belgian Supreme Court, Decision of 6th November, 2000, FJF 2000/76 and Decision of 28 May 2004, FJF 2004/244.
[28] The Hague Court of Appel, decition of 26th April 2002, V-N 2002/52.9; BFH, 22nd January 2002, BFH/NV 2002,p.902.

The old treaty text of Art. 9(4) reads as follows:

> 4. Where an individual who is a resident of one of the States receives fees as a member of a board of directors or a non-managing member of a similar organ from a body corporate resident in the other State, the said fees shall be taxable in the latter State.

This has changed in the newly implemented Art. 15. Whereas in the old tax treaty there was no separate article on the allocation for director's income, the new tax treaty adopted such an article in Art. 15, which covers directors, members of the board and members of the supervisory board.

The new treaty text of Art. 15 reads as follows:

> 1. Directors' fees and other remuneration derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.
>
> 2. The term "member of the board of directors" includes both persons who are charged with the general management of the company and persons who are charged with the supervision thereof.

The approach used in the new provision is similar to the one recommended in the OECD Model Convention and accordingly any income of a director, may it be supervisory or managing director, shall be taxable in the state in which the company for which the director is active is located.[29]

This change means that none of the director's activities can fall under the article on employment income (now Art. 14). Thus, the application of the 183 day rule is not applicable and the full enjoyment of the 30% ruling is now limited for directors resident in Germany working for a Dutch company.

3.2.3 Changes in Art. 19 on Students and Professors

Art. 19 of the new tax treaty represents a special rule to the allocation of taxing rights in relation to income from employment. In the new tax treaty Art. 19 in principle reflects the same treatment of income for tutors and professors as it was laid down in Art. 17 of the old tax treaty. Therefore, as can be observed in the treaty texts below, tutors and professors that teach in the other state are taxed in the resident state for a period of maximum two years. After that the taxing right is granted to the work state.[30]

The old treaty text of Art. 17 reads as follows:

> Professors or teachers who are residents of one of the States and who receive remuneration, during a period of temporary residence not exceeding two years. for teaching at a university, college, school or other educational establishment in the other State may be taxed in respect of such remuneration only in the State of which they are a resident.

[29] Tweede Kamer, vergaderjaar 2012–2013, 33 615, nr. 3, p. 25.
[30] Drucksache 17/10752,p. 59.

The new treaty text of Art. 19 reads as follows:

> 1.Payments and other remuneration which a professor or a teacher who is a resident of a Contracting State and who is present in the other Contracting State for the purpose of teaching or scientific research for a maximum period of two years, starting from the date of the actual start of the teaching or scientific activities, in a university, college or other establishment for teaching or scientific research in that other State, receives for such teaching or research, shall be exempt from taxation in the other Contracting State if these payments or other remuneration do not originate from that other Contracting State.
>
> 2.This Article shall not apply to income from research if such research is undertaken not in the public interest but primarily for the private benefit of a specific person or persons.

The Netherlands were not interested in such a provision and were against the implementation in the new tax treaty, Germany however insisted on it. This article was generally not in line with the Dutch objectives for the treaty negotiations and represents one of the Dutch concessions.[31] Looking at the new article, for the first two year the residence state has the right to tax for the income of visiting professors and docents. That means a person resident in Germany, who works in the Netherlands for a German employer, is taxable in Germany. Would this person work for a Dutch employer, then it would fall under Art. 14 of the new tax treaty and consequently the tax liability would arise in the Netherlands. Thus, the rules laid down in Art. 19 mainly concern only short term secondments and conduct of research.[32]

One specific example, which is also expressed by the new paragraph 2 concerns the following: Research falling under this provision may not primarily be conducted out of private interest for a project which relates to the development of pharmaceutical products.[33] In addition, there are slowly emerging discussions, whether a new rule in form of cross-border test should be implemented to determine whether the research is being carried out primarily for private interest.[34]

3.2.4 Changes for Personnel Aboard Ships, Aircrafts and International traffic in Art. 14(4)

Another major change in the new tax treaty concerns the allocation of taxing rights in relation to personnel aboard a ship or an aircraft. In the old tax treaty the income from such employment was taxed according to Art. 10(3) in the state of the effective management of the shipping or aircraft company. This has substantially changed in the new treaty. The new Art. 14(4) states that income from personnel aboard a ship or aircraft shall exclusively be taxed in the state of resident

[31] Tweede Kamer, vergaderjaar 2012–2013, 33 615, nr. 3, p. 29.
[32] Tweede Kamer, vergaderjaar 2013–2014, 33 615, nr. 5, p. 37.
[33] Eerste Kamer, vergaderjaar 2014-2015, 33 615, nr. C, p. 8.
[34] Zie bij voorbeeld Handelingen II 2014-2015, nr. 50, p. 50-9-1 e.v.; Zo was er de motie-Nijboer/Kerstens over in kaart brengen van de gevolgen van werken over de grens voor fiscaliteit en sociale zekerheid (33615, nr. 10) zie, Tweede Kamer, vergaderjaar 2013-2014, 33 615, nr. 10; Deze motie is aangenomen, zie Handelingen Tweede Kamer, vergaderjaar 2014-2015, nr. 15, p. 1-1.

of the employee.[35] Those changes can directly be observed from the excerpts of the treaty texts below.

The old treaty text of Art. 10(3) reads as follows:

> 3. Where an individual's services are performed exclusively or predominantly on board a ship or aircraft of a shipping or air transport enterprise, they shall be deemed to have been performed in the State in which the place of management of the enterprise is situated. In case the latter State fails to tax the income derived from such services, the State of which the employee is a resident, shall be entitled to do so.

The new treaty text of Art. 14(4) reads as follows:

> 4.Notwithstanding the preceding provisions of this Article, remuneration derived by a resident of a Contracting State in respect of an employment exercised aboard a ship, aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, shall be taxable only in that State.

3.2.5 Changes for Artists and Sportsmen in Art. 16

In the old tax treaty no separate provision for artists and sportsmen existed. Merely Art. 9 on income from self-employment mentions and allocates the taxing rights accordingly.

The old treaty text of Art. 9 reads as follows:

> 1. Where a resident of one of the States derives income in respect of present or past independent activities performed in the other State, the said income shall be taxable in the latter State.
>
> 2. A person shall not be considered to perform independent activities in the other State unless he makes use, in the exercise of his occupation, of a permanent base regularly available to him there. This restriction, however, shall not apply to independent activities, of artistes, performers, athletes or entertainers.

[35] Tweede Kamer, vergaderjaar 2012–2013, 33 615, nr. 3, p. 23; see Tweede Kamer, vergaderjaar 2013–2014, 33 615, nr. 5, pp. 21-24 for a discussion of the new Article and potential conflicts with EU Law. Tweede Kamer, vergaderjaar 2013–2014, 33 615, nr. 8, p. 13-16.

The new treaty text of Art. 16 reads as follows:

> 1. Notwithstanding the provisions of Articles 7 and 14, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.
>
> 2. Where income in respect of personal activities exercised by an entertainer or a sportsperson in his capacity as such accrues not to the entertainer or sportsperson himself but to another person, that income may, notwithstanding the provisions of Articles 7 and 14, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.
>
> 3. The provisions of Paragraphs 1 and 2 shall not apply to income derived by a resident of a Contracting State from activities exercised in the other Contracting State, if the visit to that other State is financed for more than 50 per cent from public funds of one or both of the Contracting States, a "Land", a political subdivision or a local authority of one or both of the Contracting States or a "Land" or by an organisation which in one of the Contracting States is recognised as a charitable organisation, or takes place under a cultural agreement between the Governments of the Contracting States. In such a case, the income shall be taxable only in the Contracting State of which the entertainer or sportsperson is a resident.

Although the Dutch position on the taxation of income from artists and sportsmen is clearly regulated in Dutch domestic law, as being taxed in the residence state, Germany insisted in introducing a new article in relation to the income of sportsmen and artists.[36] The underlying reason that was brought forward was that this is done so typically, also in respect of the OECD Model Convent (Article 17). The Netherlands in the end agreed and Art. 16 was adopted in the new tax treaty. As a consequence, income that artists and sportsmen receive in the contracting state of performance are to be taxed in that state, which represents the OECD approach for artists and can be regarded as contradicting the previous Dutch treatment.

3.2.6 Adoption of Compensation Scheme for Art. 14, 15, 16

Another important change in the new tax treaty, which concerns all forms of income from active employment is the adoption of the compensation scheme. The change is found in the additional protocol at point XII and establishes a compensation scheme for Dutch resident frontier workers working in Germany, which cannot profit from tax advantages such as the mortgage deduction and pay higher social security contributions.

The new text of the new protocol reads as follows:

> 1.An individual who is a resident of the Netherlands and who derives income, remunerations or gains from the Federal Republic of Germany, that according to the Articles 14, 15, 16 and paragraph 1 of Article 18 may be taxed in the Federal Republic of Germany, may opt for a tax relief to be granted by the Netherlands insofar as the total amount of the Dutch and German tax due, together with the amount of premiums concerning the Netherlands general social insurances due by the residents concerned or similar contributions and premiums due on the basis of the

[36] Tweede Kamer, vergaderjaar 2013–2014, 33 615, nr. 5, p. 31-32; Drucksache 17/10752, p. 59.

German domestic social security rules, exceeds the amount of Netherlands tax and premiums concerning the Netherlands general social insurances that would have been levied from them, if that income, remunerations or those gains had been derived from the Netherlands and the Netherlands had levied from them tax and premiums concerning the general social insurances on those items of income, remunerations or gains.

This relief is provided by way of regarding the German tax, contributions and premiums due by the residents concerned themselves on their income, remunerations and gains on the basis of the German social security rules - insofar as these contributions and premiums are equivalent to the premiums concerning the Netherlands general social insurances - as Dutch wage tax and by way of crediting the German tax, contributions and premiums with the tax and premiums concerning the general social insurances due in the Netherlands.

2. The competent authorities shall determine to which extent the contributions and premiums based on regulations of the Netherlands general social insurances and on the German domestic social security rules are comparable for the purpose of the application of paragraph 1 of this Article.

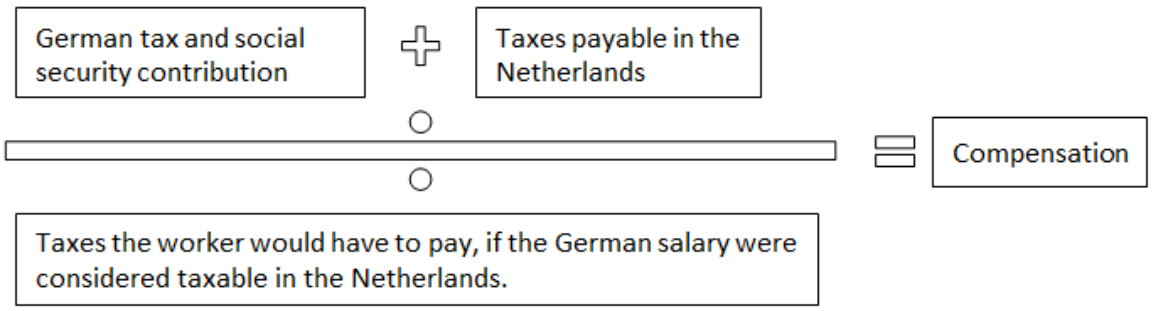
3.For the purposes of paragraphs 1 and 2 the tax, contributions and social security premiums as referred to in those paragraphs that are due in the Federal Republic of Germany do not include the tax, contributions and premiums, levied on the wages that in the Netherlands are not considered taxable wages on the basis of Article 11, first paragraph, subparagraph g, of the Netherlands Wage Tax Act 1964 ("Wet op de loonbelasting 1964" or the legal successor to this provision if this successor is identical or substantially similar to the provision it replaces).

In such situations the Dutch frontier workers can now ask the Netherlands for a compensation, which shall equate the higher tax liability in Germany and counteract the negligence of allowances available in the Netherlands. The calculation for the compensation works as follows and the difference between the following has to be taken into account.

The total amount of taxes the worker pays in the Netherlands including social security premiums, added to the taxes and contributions for social security that the worker pays in Germany divided by the amount of taxes and social security contributions that the worker would have to pay in the Netherlands, if the German salary would be taxable in the Netherlands.[37]

[37] http://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/prive/internationaal/verdragen/het_belastingverdrag_tussen_nederland_en_belgie/compensatieregelingen/bijzondere_compensatieregeling_voor_grensarbeiders; Drucksache 17/10752, p. 58-59; Tweede Kamer, vergaderjaar 2013–2014, 33 615, nr. 8, p. 24.

In short that means:



Thus, the new compensation scheme is beneficial for Dutch resident cross-border workers, as they are now able to get a compensation for Dutch tax advantages via the compensation paid by the Netherlands, what they previously were not able to do.

However, various uncertainties remain in respect of the compensation scheme. Those include in particular:[38]

- The comparability of German and Dutch social security contributions paid by the frontier workers.
- The relation between the German 'Kindergeld' and 'Kindergeldfreibeträge' as regards their consideration for the calculation of the compensation.
- The treatment of the health care contribution paid by the employer for workers that voluntarily chose to join the general health care scheme even though they surpass the salary threshold that makes joining the scheme obligatorily. If the employer's contribution falls within Art. 11d of Wet op de loonbelasting 1964, the treatment of this contribution shall be determined by the foreign tax authority. How this is done, is still uncertain.
- The way in which the German tax liability is calculated for the purposes of the compensation scheme. A preliminary way to determine the German taxes due is through a copy of the German final tax report. However, whether this suffices or not is still unclear, further ways may be possible.

Concerning the first mentioned uncertainty, the comparability of social security premiums, clarification has been provided by the recently published mutual agreement between Germany and the Netherlands on a regulation for Dutch resident frontier workers working in Germany. The new regulation enters into force as from 28 May 2016 and stipulates that German social security contributions paid by Dutch resident frontier workers are not considered in the calculations for the compensation. The underlying rationale is that Dutch and German social security contributions are not comparable.[39]

[38] Tweede Kamer, vergaderjaar 2013–2014, 33 615, nr. 8, p. 23-25.
[39] Staatscourant, Officiële uitgave van het Koninkrijk der Nederlanden, Nr. 31614, 15 juni 2016.

3.2.7 Concluding Remarks Concerning the Changes in the New Tax Treaty

As has been shown in the foregoing provided overview of the changes in the new tax treaty, various changes for cross-border workers can be highlighted. Whereas only minor changes can be found in the actual general employment provision (Art.14(1-3). In contrast, quite some changes can be observed for the tax treatment of personnel working aboard ships and aircrafts, directors, as well as artists and sportsmen. The allocation of taxing rights for personnel aboard a ship or aircraft shifted from state of effective management of the employer to the resident state of the employee. Artists and Sportsmen are now taxed in the state of performance according to the OECD approach and not in the state of residents anymore and Directors irrelevant of their function as member of supervisory or management board are now taxed in the state where the company is resident for which the director works. Not much changed in relation to the income professors and docents for short term visits, except for the fact that a separate provision has been implemented in the new tax treaty.

Apart from all those changes in the new tax treaty, the most influential for all forms of employment income derived by frontier workers between Germany and the Netherlands may be the adoption of a compensation scheme for the higher tax burden Dutch resident workers are facing in Germany. Therefore, the next section is dedicated to discuss projections provided by the Dutch parliament in relation to benefits the compensation scheme may or may not have in some general employment situations, covered by Art. 14 of the new tax treaty.

3.2.8 Case examples for Frontier Workers

For the purpose of the discussion of the compensation scheme in the new tax treaty (additional protocol at point XII), the calculations provided by the Dutch Commission for Finances in 2013 are taken. Those examples were requested in the Dutch parliament[40] to demonstrate the changes the compensation scheme along with the splitting tariff may have in some general situations on the net salaries. In ten different scenarios net salary changes for married couples, solitaries, single working parents, with or without children is calculated on estimated gross salaries. For each scenario the possible compensation and benefits from the splitting tariff is shown.

Before the cases that have been worked out by the Dutch parliament are presented some limitations have to be mentioned at this point. First, the situations used for the examples are hypothetical examples, since the new tax treaty only recently, in January 2016, entered into force no current numbers are available. Second, the scenarios presented were drawn up in 2013 and therefore illustrate merely a potential impact the compensation scheme and the German splitting tariff can have in these situations. In addition, due to the fact that the examples were drawn up in 2013 recent developments such as the mutual agreement between Germany and the Netherlands regarding a regulation for calculation of the compensation scheme are not accounted for. Thus,

[40] Tweede Kamer, vergaderjaar 2012–2013, 33 615, nr. 4, pp. 25-28.

the reality, which will only be measurable after the general transition period is over, may turn out to be quite different. Third and lastly, the situations dealt with only observe some general case scenarios. In real life many different constellations and very specific cases may arise, which require tailor made analyses. Such cases are not included in the samples provided below. Thus, the examples laid down by parliament shall serve only as an indication of how the new treaty may change the situation of frontier workers. In the following paragraphs the cases and respective calculations are outlined, taken directly from the parliamentary documents publicly available.

Case 1A

Both spouses reside in the Netherlands and are in paid employment in Germany. Spouse 1 earns a gross annual salary of €30,000. Spouse 2 earns a gross annual salary of €20,000. They have their own home that is mortgaged. The outstanding balance on their home is €5,000. The employment income of both spouses is taxed fully in Germany. Both spouses are subject to German social security legislation.

Effect of Case 1A

Both spouses enjoy the benefit of the German splitting tariff. The combined German tax of €5,902 is allocated in proportion to each spouse's gross salary. If the own-home tax deduction is allocated to spouse 2 as the lower earner, the box-1 income of this person is €12,810 and the compensation calculation works out at €1,136. The compensation in this case is €1,225. The benefit of the German splitting tariff is €68.

Spouse 1

Salary conversion

Gross salary		30,000
Minus:		
German pension insurance	2,835	
German unemployment insurance	450	
Taxable salary NL		26,715
Own home	5,000	
Box 1 income		**21,715**

Calculation of compensation

German tax		3,541
Income tax	1,373	
National insurance premium	6,764	
Minus:		
Tax credits	3,724	
Compensation calculation		4,413
Compensation		**0**

Spouse 2

Salary conversion

Gross salary		20,000
Minus:		
German pension insurance	1,890	
German unemployment insurance	300	
Taxable salary NL		17,810
Own home		
Box 1 income		**17,810**

Calculation of compensation

German tax		2,361
Income tax	1,041	
National insurance premium	5,547	
Minus:		
Tax credits	3,603	
Compensation calculation		2,985
Compensation		**0**

Case 1B

See case 1A, but with two school-aged children of 13 and 16.

Effect of Case 1B

Both spouses enjoy the benefit of the German splitting tariff. The combined German tax of €5,608 is allocated in proportion to each spouse's gross salary. If the own-home tax deduction is allocated to spouse 2 as the lower earner, the compensation in that case is €1,106. The benefit of the German splitting tariff is €157.

Spouse 1

Salary conversion

Gross salary		30,000
Minus:		
German pension insurance	2,835	
German unemployment insurance	450	
Taxable salary NL		26,715
Own home	5,000	
Box 1 income		**21,715**

Calculation of compensation

German tax		3,365
Income tax	1,373	
National insurance premium	6,764	
Minus:		
Tax credits	3,724	
Compensation calculation		4,413
Compensation		**0**

Spouse 2

Salary conversion

Gross salary		20,000
Minus:		
German pension insurance	1,890	
German unemployment insurance	300	
Taxable salary NL		17,810
Own home		
Box 1 income		**17,810**

Calculation of compensation

German tax		2,243
Income tax	1,041	
National insurance premium	5,547	
Minus:		
Tax credits	3,603	
Compensation calculation		2,985
Compensation		**0**

Case 2: single person working in Germany

Case 2A A single person resides in the Netherlands and is in paid employment in Germany. The employee earns a gross annual salary of €30,000. He has his own home that is mortgaged. The outstanding balance on his home is €5,000. The employment income of the employee is taxed fully in Germany. He is subject to German social security legislation.

Effect of Case 2A

Salary conversion

Gross salary		30,000
Minus:		
German pension insurance	2,835	
German unemployment insurance	450	
Taxable salary NL		26,715

Own home	5,000	
Box 1 income		**21,715**

Calculation of compensation

German tax		4,226
Income tax	1,373	
National insurance premium	6,764	
Minus:		
Tax credits	3,724	
Compensation calculation		4,413
Compensation		**0**

Case 2B

See case 2A, but with salary at €95,000 and outstanding balance on the home at €16,000.

Effect of Case 2B

Salary conversion

Gross salary		95,000
Minus:		
German pension insurance	6,578	
German unemployment insurance	1,044	
Taxable salary NL		87,378
Own home	16,000	
Box 1 income		**71,378**

Calculation of compensation

German tax		29,982
Income tax	20,141	
National insurance premium	10,391	
Minus:		
Tax credits	2,551	
Compensation calculation		27,892
Compensation		**2,000**

Case 3: sole earner in Germany

Case 3A

Both spouses reside in the Netherlands. Spouse 1 is in paid employment in Germany. Spouse 2 does not receive any employment income. Spouse 1 earns a gross annual salary of €30,000. They have their own home that is mortgaged. The outstanding balance on their home is €5,000. The employment income of spouse 1 is taxed fully in Germany. He is subject to German social security legislation. The benefit of the German splitting tariff is €2,830.

Effect of Case 3A

Salary conversion

Gross salary		30,000
Minus:		
German pension insurance	2,835	
German unemployment insurance	450	
Taxable salary NL		26,715
Own home	5,000	
Box 1 income		**21,715**

Calculation of compensation

German tax		1,396
Income tax	1,373	
National insurance premium	6,764	
Minus:		
Tax credits	3,724	
Tax credits for non-earning partner	2,001	
Compensation calculation	2,412	
Compensation		**0**

Case 3B

See case 3A, but with two school-aged children of 13 and 16. The benefit of the German splitting tariff is €2,610.

Effect of Case 3B

Salary conversion

Gross salary		30,000
Minus:		
German pension insurance	2,835	
German unemployment insurance	450	
Taxable salary NL		26,715
Own home	5,000	
Box 1 income		**21,715**

Calculation of compensation

German tax		1,396
Income tax	1,373	
National insurance premium	6,764	
Minus:		
Tax credits	3,724	
Tax credits for non-earning partner	2,001	
Compensation calculation	2,412	
Compensation		**0**

Case 4: both parents working in the Netherlands and Germany

Case 4A

Both spouses reside in the Netherlands and are in paid employment. Spouse 1 works in Germany and earns a gross annual salary of €30,000. Spouse 2 works in the Netherlands and earns a gross annual salary of €20,000. They have their own home that is mortgaged. The outstanding balance on their home is €5,000. The employment income of spouse 1 is taxed fully in Germany. Spouse 1 is subject to German social security legislation. They have two school-aged children of 13 and 16.

Effect of Case 4A

Salary conversion

Gross salary		30,000
Minus:		
German pension insurance	2,835	
German unemployment insurance	450	
Taxable salary NL		26,715
Own home	5,000	
Box 1 income		**21,715**

Calculation of compensation

German tax		2,702
Income tax	1,373	
National insurance premium	6,764	
Minus:		
Tax credits	3,724	
Compensation calculation		4,413
Compensation		**0**

In this case, the spouses will choose to allocate the own-home tax deduction to spouse 2, who only has Dutch income, thus producing a tax advantage of €1,868. The benefit of the German splitting tariff is €1,304. Case 4B See case 4A, but with spouse 1's salary at €60,000, spouse 2's salary at €35,000, and the outstanding balance on their home at €16,000.

Effect of Case 4B

Salary conversion

Gross salary		60,000
Minus:		
German pension insurance	5,670	
German unemployment insurance	900	
Taxable salary NL		53,430
Own home	16,000	
Box 1 income		**37,430**

Calculation of compensation

German tax		12,166
Income tax	4,345	
National insurance premium	10,392	
Minus:		
Tax credits	3,197	
Compensation calculation		11,540
Compensation		**626**

In this case, the spouses will choose to allocate the own-home tax deduction to spouse 2, who only has Dutch income, thus producing a tax advantage of €6,687. They will then waive the option of compensation for spouse 1. The benefit of the German splitting tariff is €1,850.

Case 4C

See case 4A, but with spouse 1's salary at €60,000, spouse 2's salary at €35,000, the outstanding balance on their home at €16,000, and no children.

Effect of Case 4C

Salary conversion

Gross salary		60,000
Minus:		
German pension insurance	5,670	
German unemployment insurance	900	
Taxable salary NL		53,430
Own home	16,000	
Box 1 income		**37,430**

Calculation of compensation

German tax		12,356
Income tax	4,345	
National insurance premium	10,392	
Minus:		
Tax credits	3,197	
Compensation calculation		11,540
Compensation		**816**

In this case, the spouses will choose to allocate the own-home tax deduction to spouse 2, who only has Dutch income, thus producing a tax advantage of €6,687. They will then waive the option of compensation for spouse 1. The benefit of the German splitting tariff is €1,902.

Case 4D

See case 4A, but with spouse 1's salary at €60,000 (taxed 75% in Germany and 25% in the Netherlands), spouse 2's salary at €35,000, and the outstanding balance on their home at €16,000. Spouse 1 is covered by social insurance in the Netherlands.

Effect of Case 4D

Salary conversion

Gross salary		60,000
Minus:		
German pension insurance	0	
German unemployment insurance	0	
Taxable salary NL		60,030
Own home	16,000	
Box 1 income		**44,000**

Calculation of compensation

German tax	6,586	
Income tax	0	
National insurance premium	10,392	
Total collection		16,044
Income tax	7,104	
National insurance premium	10,392	
Minus:		
Tax credits	2,934	
Compensation calculation		14,562
Compensation		**1,482**

In this case, the German splitting tariff produces no benefit. In this case, the spouses will choose to allocate the own-home tax deduction to spouse 2, who only has Dutch income, thus producing a tax advantage of €6,687.

Spouse 1 will then waive compensation of €1,482. Spouse 1 will also owe €3,556 more in the Netherlands. The total tax loss for spouse 1 is €5,038, which is compensated by spouse 2's tax advantage of €6,687. The members of the Christian Democratic Appeal (CDA) party ask whether the Netherlands and Germany have agreed on the comparability of the German social security contributions and the Dutch national insurance premiums for the application of the compensation scheme. Although this discussion has not yet taken place, this aspect will be taken up with the German authorities together with the other aspects of the implementation process of the new Treaty.

Lastly, the members of the CDA party present a final simplified case which they say occurs often in practice. The taxpayer is a resident of the Netherlands, married, with no children, and the spouse does not earn any income. The gross employment income for work performed in Germany amounts to €85,000. The German income tax deducted at source amounts to €20,000, the employee's contribution towards 'Gesetzlichen Rentenversicherung' (statutory pension insurance) is €6,500, towards 'Arbeitslosenversicherung' (unemployment insurance) is €1,000, and towards 'Pflegeversicherung' (long-term care insurance) is €560. The outstanding balance on their own home is approximately €16,000. The Dutch taxes are further already set at €14,000 + €7,200 for income tax/national insurance premiums and payment of a tax credit of €2,000 for the non-earning partner has been taken into account. Based on the above cases, this case would lead to the following outcome.

Salary conversion

Gross salary		85,000
Minus:		
German pension insurance	6,500	
German unemployment insurance	1,000	
Taxable salary NL		77,500
Own home	16,000	
Box 1 income		**61,500**

Calculation of compensation

German tax		20,000
Income tax	14,000	
National insurance premium	7,200	
Minus:		
Tax credits of non-earning partner	2,000	
Compensation calculation		19,200
Compensation		**800**

In this case, the benefit of the German splitting tariff is €7,608.'[41]

[41] Lower House of Parliament, session year 2013-2014, 33 615, no. 5, pp. 50-58 retrieved from https://zoek.officielebekendmakingen.nl/blg-266255

3.2.9 Conclusion Parliamentary Examples

As can be seen from the various cases above the compensation scheme as it has been expected to work in 2013 does not warrant great benefits for Dutch frontier workers that work in Germany. In the presented situations the compensation scheme up to a salary of gross € 60.000 rendered only minor compensations reaching a maximum € 1.600, but often remaining below € 1.000. For workers earning a salary above € 80.000 the compensation scheme may become lucrative as compensations of € 2.000 and higher. Only if specific conditions for one of the wage earner are met, then the actual compensation can in certain situations result in a higher amount.[42] Also the splitting tariff that can now be applied easier, potentially leading to tax advantages in Germany and consequently an increase in net salary. In the end, as can be observed by the general examples provided, much depends on the specific situation and benefits can vary a great deal.

Considering the compensation scheme especially the new mutual agreement on the regulation for the compensation scheme, which stipulates that German social security contributions are not comparable to Dutch social security contributions and are in this respect excluded from the compensation calculation, puts the above given examples into question. If the German contributions are not comparable and in this respect not taken into account for the compensation scheme the overall compensation might decrease, which discourages frontier workers to request the application of the compensation scheme as the benefits are going to be minimal. In addition, very recently the 'Deutsch-Niederländische Gesellschaft' (DNG) published some critical comments in relation to the new tax treaty, wherein they question the fairness of a one-sided compensation scheme in the protocol to the new treaty (No. XII).[43] According to the DNG the newly adopted compensation scheme would treat German resident frontier workers working in the Netherlands less favourably than Dutch resident frontier workers working Germany. Consequently, they sent a letter to the finance ministry of North Rhine Westphalia (NRW), in which they request an implementation of a compensation scheme also for German resident frontier workers.[44] An answer to the request of the finance ministry is yet to be awaited.

[42] In this respect see cases 1A and 1B.
[43] DNG (2016) "Benachteiligung deutscher Grenzgänger in den Niederlanden?", retrieved from: http://aha24x7.com/benachteiligung-deutscher-grenzganger-den-niederlanden/
[44] ibid.

4. Conclusion and Suggestions from a Euregional Perspective

This cross-border impact assessment was supposed to evaluate the effects of the new tax treaty on frontier workers. As mentioned in section 2.1, such an ex-post evaluation is not possible at this stage due to two reasons. On the one hand there is no reliable data available that provides an accurate overview of amount of frontier workers working in the cross-border region of Germany and the Netherlands. This can be ascribed to the differing approaches to investigate frontier workers and to the fact that some frontier workers find themselves in very specific situations which are not captured by these approaches. On the other hand effects can only be measured once the first numbers can be gathered. This however, requires the tax treaty to be applicable in its entirety. Since Art. 33 of the new tax treaty introduces a transition period of one year, in which the old tax treaty may still be applied, only at the end of 2018 real effects on frontier workers may be measurable.

Grounded in those limitations this cross-border impact assessment provides little added value in terms of evaluation, it rather provides an overview of the new changes introduced that affect frontier workers. Furthermore, it shortly discusses projections made by the Dutch parliament in 2013 involving the new compensation scheme and the German 'Splittingverfahren'. As became clear those estimations are merely indicative and due to new developments such as the recently published mutual agreement may not be realistic anymore. The mutual agreement on a regulation for the calculation of the compensation scheme denies comparability of German social security contributions with Dutch contributions and those are therefore not considered in the calculation of the compensation.

Thus, to draw definite conclusion patience, until reliable data becomes available, is required. One lesson that can be drawn from this impact assessment is clearly that a timely and coherent monitoring of frontier workers and of the consequences stemming from the new tax treaty is essential for future impact assessments.

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