



Cross-border Impact Assessment 2016

Dossier 4: Social security: illness and disability



The Institute for Transnational and Euregional cross border cooperation and Mobility / ITEM is the pivot of research, counselling, knowledge exchange and training activities with regard to cross border mobility and cooperation.

Maastricht University

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Dossier 4: Social security: illness and disability

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*'Nederland als één groot grensgebied [...] Zeven van de twaalf provincies grenzen aan het buitenland en twee miljoen Nederlandse ingezetenen wonen in Nederlandse grensgemeenten. Juist in de grensgebieden worden burgers, maatschappelijke organisaties, instellingen en overheden bij grensoverschrijdende contacten op het terrein van bijvoorbeeld wonen, werken, onderwijs en zorg, geconfronteerd met barrières die worden opgeworpen door cultuurverschillen én door verschillen in nationale wet- en regelgeving. Het Europa zonder binnengrenzen en met een vrij verkeer van personen, diensten en kapitaal is in veel opzichten vaak een papieren realiteit. Tegelijkertijd liggen er juist in de grensgebieden bijzondere ontwikkelingskansen.'*¹

(The Netherlands as one great border area [...] Seven of its twelve provinces share a border with a foreign country and two million of its citizens live in Dutch border municipalities. It is exactly in these border areas that citizens, societal organisations, institutions and governments are confronted with barriers caused by cultural differences and differences in national legislations and regulations in areas such as residence, work, education and care. A Europe without internal borders and free movement of people, services and capital is in many ways a paper reality. Simultaneously, it is exactly in these border areas that special development opportunities arise.)

1. Introduction

Any person working in the Netherlands who becomes ill or disabled there falls under the Dutch regulations regarding illness (article 7:629, Dutch Civil Code) and disability (Work and Income according to Labour Capacity Act (Dutch: WIA²)). This also applies to frontier workers residing in another EU Member State. These employees and their employers will have to conform to the Dutch regulations, which are increasingly, and more so than in other Member States, integrating concepts such as privatisation, activation and reintegration. Since social security is a national competence and will remain so for the time being, Member States are allowed to design and alter their own system of social security.

This report focuses on two social security risks: short-term and long-term incapacity for work, i.e. illness and disability. The reason for this choice is that the Dutch systems put in place to support these two social security risks have been fundamentally restructured over the past two decades, and, additionally, they differ significantly from the systems in other Member States.³ Moreover, there are but few European regulations available to provide any clarity in case of cross-border illness or disability.

The Dutch government shifted the responsibility for income provision in case of illness to the private parties, i.e. employers and employees. This privatisation of the Dutch Ziektewet (Sickness Benefits Act) has led to the current obligation to continue the payment of wages for a maximum of 104 weeks and is based on the provisions of Article 7:629 of the Dutch Civil Code. Connected to this

¹ Raad voor het openbaar bestuur (Rob), *Besturen over grenzen*, Adviesrapport over het bestuurlijk functioneren van grensoverschrijdende samenwerkingsverbanden, mei 2008, p.7. (Council for Public Administration, *Administration across borders*, Advisory Report on the administrative functioning of cross-border partnerships)

² Wet WIA: Wet werk en inkomen naar arbeidsvermogen, wet van 10 november 2005, *Stb.* 2005, 572 (zoals nadien gewijzigd). (Work and Income according to Labour Capacity Act of 10 November 2005, Bulletin of Acts & Decrees, 2005, 572 (as amended since).

³ The continued payment of wages obligation has been extended step by step in 1994, 1996 and 2004; the *Wet WIA* (Work and Income according to Labour Capacity Act) took effect in December 2005.

obligation for continued payment of wages are many other regulations to stimulate both employers and employees to keep sick employees in the labour process or to have them return to it as soon as possible. One of the most famous regulations is the Wet verbetering poortwachter (Gatekeeper Act) of 2002, which tied active coaching of sick employees to a strict time path. Contrary to other Member States, the Dutch Ziektewet (Sickness Benefits Act), as a regulation subject to public law, now only serves as a safety mechanism, given that most employees fall under the obligation for continued payment of wages governed by labour law.

As far as long-term *disability* is concerned, which usually starts after the obligatory 104 weeks of continued payment of wages, a strong tendency towards activation can be observed, including, for example, the hiring of private re-integration companies for the execution of the WIA (Work and Income according to Labour Capacity Act). The WIA (Work and Income according to Labour Capacity Act) is also supported by other regulations.

The EC Regulations 883/2004 and 987/2009 play an important role in situations of cross-border employment.⁴ These European regulations are aimed at the coordination of national systems of social security without striving for harmonisation. Contrary to the Dutch regulations, these coordinating regulations contain but few stipulations on income provision for employees who are ill or reintegrating from a situation of disability.

This contrast between the Dutch regulations, which are many, strict, complex and primarily nationally oriented, and the European regulations, which are very few and unspecific, can produce bottlenecks or gaps in cross-border employment for both EU workers and their employers. The lack of a transparent foreign policy on the part of the Dutch government and its implementing body UWV makes it difficult to establish which rules exactly govern cross-border situations of illness or disability where the Dutch regulations apply in combination with a foreign component, such as living abroad or having an employment contract under foreign law.

This report hypothesises that the Dutch regulations regarding illness and disability (may) hinder the free movement of labour, (may) lead to legal uncertainty and (may) endanger social cohesion in Europe.

A PhD thesis on this subject was defended recently, entitled *Activering en privatisering in de Nederlandse ziekte- en arbeidsongeschiktheidsregeling in grensoverschrijdende situaties (Activation and privatisation in the Dutch illness and disability system in cross-border situations).*⁵

⁴ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166 of 30 April 2004 (as amended since) and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284/1 of 30 October 2009 (as amended since).

⁵ S. Montebovi, *Activering en privatisering in de Nederlandse ziekte- en arbeidsongeschiktheidsregeling in grensoverschrijdende situaties* (diss. Tilburg), Apeldoorn/Antwerpen: Maklu 2016. (*Activation and privatisation in the Dutch illness and disability system in cross-border situations*)

2. Research Objectives, Definitions, Themes and Indicators

2.1 Effects: today or in the future; Objective: ex-post or ex-ante

While this cross-border impact assessment contains both ex-post and ex-ante effects, the ex-post analysis will be the more extensive of the two.

The ex-post assessment focuses on the bottlenecks and gaps that can be directly observed from a thorough study of the Dutch regulations regarding illness and disability.

The ex-ante assessment can be performed using the recommendations from the above PhD thesis.

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

This study uses a broad definition of the term border area: the national border shared by the Netherlands and other Member States. A cross-border situation can pertain to the daily commuting of cross-border workers between their country of residence Belgium, or Germany, and their country of employment, the Netherlands. It can, however, also include Polish or Spanish citizens who work in the Netherlands but return to their country of origin after a short or long period of disability. In other words, the definition of border is geographical in nature and linked to the national border. In the Euregional situation, this might constitute an impediment to cross-border traffic and, as a result, to a common, cross-border labour market.

2.3 Cross-border effects on? What are the themes of the research, its principles, benchmarks and indicators?

2.3.1 Disability Dossier: short-term and long-term. Which focus?

1. European Integration.

The *free movement of people* (Article 45, Paragraph 1 TFEU⁶) gives workers the opportunity to seek employment in another Member State, while any discrimination on the grounds of *nationality* is forbidden (Article 45, Paragraph 2 TFEU). The social security rights of mobile EU workers are anchored in and supported through coordination regulations (Articles 46 and 48 TFEU). These regulations, i.e. basic regulation 883/2004 and implementation regulation 987/2009, guarantee EU citizens the validity of social security rights and duties across national borders. Workers who are entitled to Dutch illness or disability benefits can, in other words, also claim those benefits if they reside abroad.

The *coordination regulations* reassert the principle of *equal treatment*:

- 'It is necessary, within the framework of such coordination, to guarantee within the Community equality of treatment under the different national legislation for the persons concerned.': *Recital 5 of EC Regulation 883/2004*.

- 'The general principle of equal treatment is of particular importance for workers who do not reside in the Member State of their employment, including frontier workers.' *Recital 8 of EC Regulation 883/2004*.

⁶ TFEU: Treaty on the Functioning of the European Union.

- 'Equal treatment of EU citizens'. *Article 4 EC Regulation 883/2004*.

- Waiving of residence requirement unless justified and provided by the Regulation: *Article 7 and recital 16 EC Regulation 883/2004*.

Dutch legislation should also be respected in certain cross-border situations, based on the allocation rules set out in the coordination regulations. They determine which national social security system will prevail in a cross-border employment situation involving multiple Member States. If the coordination regulations designate Dutch social security legislation as the applicable law, the entire Dutch social security legislation shall be applicable for this reason.⁷ Nevertheless, it is not always possible to apply Dutch laws and policies completely unaltered in a cross-border situation. In addition, the Dutch policy regarding illness, i.e. in the first 104 weeks, and disability or invalidity, i.e. after 104 weeks, diverges significantly from common practice in other Member States and is only supported by the Regulations to a very limited extent.

As mentioned earlier, illness and disability in the Netherlands are always paired with strong activation and reintegration stimuli for both the employer and the sick cross-border worker. A thorough analysis (cf. PhD thesis Montebovi, June 2016) indicates that, firstly, the *Dutch rules* are not always known nor applicable in cross-border situations; secondly, a *transparent foreign policy* is lacking; and, thirdly, this causes *legal uncertainty* for both employer and employee. This may hinder both parties in the implementation of the extensive Dutch legislation and regulations, and it might make them less inclined to do business if the Dutch social security legislation is (meant to be) applicable.

2. Cross-border socio-economic development/sustainable development

The effects of the Dutch illness and disability regulations on sustainable cross-border development are difficult to measure from a legal perspective. Nevertheless, studies from 2015 have shown that current cross-border commuting is only one-tenth of what it could be.⁸ The Netherlands is at the heart of Europe when it comes to labour migration since the migration flows between Belgium, Germany, Luxembourg and France and the Netherlands constitute approximately 40% of all EU labour migration.⁹

The Europe 2020 strategy, successor to the Lisbon strategy, stresses that 'the EU must become a smart, sustainable and inclusive economy in a fast-changing world.'¹⁰ This means that the EU and the EU countries must cooperate to achieve more employment, higher productivity and greater social cohesion.'¹¹

Several *EC* documents stress the economic aspect of cooperation, nevertheless often also referring to the necessity of a 'package aimed at stimulating labour mobility and combating fraud through

⁷ On grounds of the Paletta I ruling (C-45/90), the obligation for continued payment of wages under labour law qualifies as a social security obligation in cross-border situations.

⁸ A. Weterings en G. van Gessel-Dabekausen, *Arbeidsmarkt zonder grenzen*, PBL en CBS, Den Haag 2015: p.6, 9, 22 en 33 (*Labour Market without Borders*, Netherlands Environmental Assessment Agency and Statistics Netherlands); Centraal Bureau voor de Statistiek (CBS) en Information und Technik Nordrhein-Westfalen (IT-NRW), *De arbeidsmarkt in de grensregio's van Nederland en Noordrijn-Westfalen*, CBS: Den Haag/Heerlen/Bonaire 2015 (*The Labour Market in the Border Regions of the Netherlands and North Rhine-Westphalia*, Statistics Netherlands).

⁹ Benelux Unie, Secretariaat-Generaal, *Benelux. Kerncijfers en trends 2014*, p.41 (*Benelux. Key Figures and Trends 2014*)

¹⁰ See ec.europa.eu/europe2020/

¹¹ See ec.europa.eu and also European Council, Conclusions, 1 and 2 March 2012, EUCO4/12, Brussels, 2 March 2012, p.2.

better coordination of the social security systems, a revision of the posting directive and an improved EURES'.¹²

Despite the difficulty of determining the socio-economic consequences of the Dutch illness and disability regulations, several points of attention can be identified. The problem in the relation between *Dutch* employers and their EU employees residing abroad is not so much the continued payment of wages but any reintegration that might take place in the employee's country of residence after a period of illness. In this case, the Dutch rules may clash with foreign rules and policy, which has not been aimed at reintegration as prominently as in the Netherlands.

The relation between a *foreign* employer and its employee who has to be insured under Dutch social security legislation may become strained from the first day of illness. The main bottleneck is the familiarity of the foreign employer with Dutch policy and the responsibility of the employer for continued payment of wages during the illness and reintegration process. The employer can no longer count on any support, such as information about rights and obligations, from the Dutch government, as it has increasingly shifted the responsibility for income provision in case of illness to the employer since 1994. Not only will the foreign employer be astonished at the long period of continued payment of wages, unique to the EU, but also at the rights and obligations associated.

In both cases, with a Dutch and a foreign employer, it appears that the application of the Dutch illness and disability regulations can be experienced as an obstacle. The costs and responsibilities involved substantially outweigh those of the cases where no Dutch legislation is applicable or where it does not apply across the border. The period of continued payment of wages or the period of disability, as regulated by the Work and Income according to Labour Capacity Act (WIA), and the relevant responsibilities could negatively influence the choice for a cross-border employment relationship in times of economic crisis or fierce competition. A cross-border situation governed by Dutch social security legislation is not necessarily attractive in such a scenario.

3. Cross-border governance structures

This theme touches upon cohesion in Europe and how this is influenced by the Dutch illness and disability regulations. If the Dutch regulations influence cross-border workers and their employers, this has an immediate effect on *social cohesion* in Europe.

Research has shown that the Dutch regulations on illness and disability contain little to no transparent policy for application in cross-border situations.¹³ The Dutch government assumes that the Dutch regulations can be implemented abroad in a similar manner as in the Netherlands.

Given the complex and unique character of these Dutch regulations, it is useful to study the influence of these regulations with their many privatisation and reintegration elements on social cohesion in the EU. Montebovi's dissertation (June 2016) also identifies the importance of social cohesion and concludes that it is not (always) attractive to have to apply the Dutch social security legislation in cross-border situations of illness and/or disability. Both employers, employees and foreign bodies will be confronted with legal loopholes, unclear policies, flawed rules and a strongly nationally oriented Dutch policy.

¹² See, among others, EC Work Programme 2015, *A New Start*, 16 December 2014, p. 3 and Annex 1; see also State of the Union by J. Barroso (EC President) on 12 September 2012, p. 5-6.)

¹³ See the introduction and conclusion of S. Montebovi, *Activering en privatisering in de Nederlandse ziekte- en arbeidsongeschiktheidsregeling in grensoverschrijdende situaties* (diss. Tilburg), Apeldoorn/Antwerpen: Maklu 2016 (*Activation and privatisation in the Dutch illness and disability system in cross-border situations.*).

As a result, employers might find it administratively, procedurally and financially more attractive to hire employees who reside and work in the Netherlands than employees who reside abroad. The legal consequences of the latter situation weigh more heavily and are difficult to estimate. In special cases where the employers are not based in the Netherlands either, their poor knowledge of the strict Dutch illness and disability legislation forms an extra burden. Such employers cannot fall back on any Dutch government body for support during the period of continued payment of wages. As a result of the privatisation of the Dutch Ziektewet (Sickness Benefits Act), income provision has been fully left to private parties, i.e. employers and employees, both of whom have rights and obligations during the period of illness, the disregard of which is penalized through financial sanctions.

Among others, social cohesion in the EU Member States rests on:

- *Loyal cooperation*: Article 4 TEU¹⁴
- *Closer cooperation between Member States*: Article 20 TEU (VEU); recitals 2, 8, 9 of Regulation (EC) 987/2009, Chapter II of Regulation (EC) 987/2009
- *EC focus on social cohesion*¹⁵

The cooperation between the government bodies and sometimes between entrepreneurs from the Netherlands and its neighbours Belgium and Germany appears to be more profound than that between the Netherlands and other Member States with employees who are socially insured in the Netherlands. The main reason is that there is more cross-border commuting between these neighbouring countries than between the Netherlands and other countries. As a consequence, the implementing bodies and other relevant entities, such as doctors, are better informed on mutual legislation and policies, which obviously benefits the cross-border worker. Making use of existing *networks* turns out to be essential. While telephone or digital contact is important, regular meetings, even once or twice a year, absolutely add value. Such talks about national legislative developments or policy changes in Belgium, the Netherlands or Germany have a strong ex-ante effect and prevent the development of expensive, long-term dossiers that require ex-post processing.

Nevertheless, differences remain noticeable, for example in medical checks between Germany and Belgium. While German medical reports can cause language problems, their content is much closer to the Dutch requirements in that they are elaborate and include the possibility of reintegration. The Belgian (Flemish) medical reports, on the other hand, offer Dutch employers or the implementing body UWV insufficient information to assess the reintegration possibilities. In such cases, a second opinion can provide the desired alignment with the Dutch regulations.

Dutch law dictates that activation and reintegration measures be initiated swiftly and pervasively. In cross-border situations, however, this isn't always done or can't always be done in the same way as in the Netherlands. This different application of Dutch rules abroad not only hits employers but also employees, who are more often left to fend for themselves. They are sometimes even shunned by the relevant bodies who prefer focusing on their 'own citizens' and their reintegration into the

¹⁴ TEU: Treaty on the European Union.

¹⁵ See, among others, Communication from the Commission to the European Parliament and the Council, Strengthening the Social Dimension of the Economic and Monetary Union, 2 October 2013, COM(2013) 690 final, p.3-4; Herman van Rompuy, accepting the Charlemagne Prize, May 2014.

labour process rather than on sick employees with social insurance in the Netherlands who also have to or want to reintegrate into the foreign labour process if they reside there.

i. Dossier on disability: what are the principles, objectives and benchmarks for achieving and measuring a positive situation in border regions

Table: Principles, benchmarks and indicators

Principles	Benchmark	Indicator/Method
<p>European integration</p> <p><i>Free movement of persons (article 45 TFEU; recital 3 EC Regulation 883/2004; recital 13 EC Regulation 987/2009)</i></p> <p><i>Equal treatment (EC Regulation 883/2004: recital 5 and 8, article 4 and 7)</i></p>	<ul style="list-style-type: none"> • Obligation to continue the payment of wages for the employer for a maximum of 104 weeks in case of illness • Reintegration obligation of employees and employers during the period of illness (first 104 weeks) • Reintegration obligation for employees and employers/UWV Employee Insurance Agency during the period of disability (after 104 weeks) • In cases of illness and disability: focus on the responsibility of the employer and employee instead of the government. 	<ul style="list-style-type: none"> • Measuring issues concerning the continued payment of wages: how often do problems occur? How often do they occur with large/small/foreign employers? Solution for the employee? Contact point? • To what extent can a sick employee with continued payment of wages fulfil his/her reintegration obligation in practice if reintegration occurs in the country of residence instead of the country of work (Netherlands) and the country of residence is not (very) familiar with reintegration in case of illness? • What policy does the UWV Employee Insurance Agency maintain when assessing reintegration efforts abroad? Why is this not a transparent policy? • The leading principle behind reintegration abroad remains that the UWV Employee Insurance Agency offers conditions identical to the national situation. For this reason, the admission requirement of Article 65 WIA (Work and Income according to Labour Capacity Act) is dropped for persons last insured abroad with a relatively small disability insurance, e.g. WIA in combination with foreign disability benefits; the 'mandatory' reintegration report when applying for WIA benefits has turned out not to be a hard requirement after all. • The tailor-made approach having a central role in the WIA (Work and Income according to Labour Capacity Act) appears to be applied more in cross-border situations than in national situations. However, this approach also leads to legal uncertainty because it is not clear for the WIA entitled person which means for reintegration can be applied, how they are assessed and which penalties may possibly be imposed. Furthermore, the assessment

		<p>appears to (potentially) depend on the personal views of the UWV reintegration expert.</p> <ul style="list-style-type: none"> Information point for the support of foreign employers: back at UWV Employee Insurance Agency?
<p>Sustainable/socio-economic development</p> <p>Article 3, paragraph 3, TFEU</p> <p>Europe 2020 strategy</p> <p>EU documents: measures for economic cooperation, but also increased EU labour mobility (See, among others, EC Work Programme 2015, <i>A New Start</i>, 16 December 2014, p. 3 and Annex 1, initiative No 8; see also State of the Union by J. Barroso (EC President) on 12 September 2012, p. 5-6.</p>	<p>Reintegration and activation in case of illness and disability have been further developed in the Netherlands than in other Member States.</p> <p>The consequences of illness and disability must be clear to the cross-border worker. In addition, situations in which the employee is not insured are to be avoided.</p> <p>The complexity and mandatory nature of reintegration under Dutch law may not form an impediment to a cross-border labour market.</p>	<ul style="list-style-type: none"> Does the deployment of policy means such as activation and reintegration in situations of illness and disability lead to more and sustainable labour? The Europe 2020 strategy also focuses on increasing labour productivity. Can a direct link with the Dutch targets be measured? When will the Regulation incorporate more reintegration provisions? The coordination of the activation measures of the different Member States is a 'burning issue'.¹⁶ This reintegration obligation according to Dutch law may be too heavy a burden for both employer and employee and may thus be qualified as an impediment to a cross-border employment relationship. Dutch law dictates that reintegration activities must start as soon as possible; this includes the cross-border workers in Germany or Belgium. The German and Belgian authorities cannot or will not always cooperate on those activities as they don't correspond with their own legislation and approach.
<p>Euregional cohesion</p> <p>EC focus on social cohesion (see 2.3.1 below)</p> <p>Loyal cooperation: Article 4 TEU</p> <p>Closer cooperation between Member States: Article 20 TEU; Recitals 2, 8, 9 of Regulation (EC) 987/2009 and Chapter II of Regulation (EC) 987/2009</p>	<p>The national formulation and implementation of reintegration policy cannot impede the cooperation between cross-border partners, i.e. employers, insurance, healthcare, company physicians and general practitioners.</p> <p>Cross-border cooperation of the bodies involved in reintegration matters should enable the provision of reliable information to employers and employees and the swift solution of problems.</p>	<p>Practice shows, however, that relevant bodies do not accept each other's medical reports and often even start their own medical examinations. This is in breach of coordination legislation (Art.27, paragraph 8 and Art.87, paragraph 2 Regulation (EC) 987/2009), as well as strenuous for the relevant employees, their employers and health insurance companies.</p> <p>To what extent are Euregional partners, i.e. employment services, health insurance providers, physicians, health and safety services, employers' associations and trade unions, able to answer queries swiftly and competently?</p> <p>Can Euregional partners exert influence on the implementation of the policy?</p>

¹⁶ trESS European report 2011, Yves Jorens and Jean-Philippe Lhernould, www.tress-network.org, p.6 and see also S. Montebovi, diss.Tilburg 2016, p.299.

<p>“Een gecoördineerde aanpak binnen de Euregio Maas-Rijn is nodig om de barrières als gevolg van verschillen in fiscale en sociale regelingen op te heffen.”</p> <p>(“A coordinated approach is required within the Euregio Meuse-Rhine in order to lift the barriers caused by differences in fiscal and social regulations.”)</p> <p>Euregio Meuse-Rhine EMR 2020, 2013</p>		<p>Has the Dutch legislation improved or deteriorated the cooperation between the Euregional partners?</p> <p>Has the complex situation in the Netherlands, i.e. more and stricter reintegration legislation, led to increased information provision about the Dutch reintegration legislation with Euregional partners?</p> <p>Which cross-border, transnational and interregional collaboration programmes are in place? See <i>Kamerstukken II, 2014-2015, 32 851 (Dutch Parliamentary Papers)</i>; see publications of the Council for Public Administration (<i>Raad voor openbaar bestuur, (Rob)</i>): www.rob-rfv.nl</p>
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3. Does the measure promote or impede European integration and what does that mean for the citizens of the border regions?

It is difficult to measure the extent to which the Dutch illness and disability regulations promote or impede European integration. Nevertheless, it could be tentatively stated that the Dutch rules impede rather than promote integration, in that they shift many financial, administrative and procedural responsibilities to individual employers and employees.

Whereas Dutch employers may be expected to know the Dutch rules, their effects in a cross-border setting are not necessarily predictable. Employers often don't know whether and how integration can be achieved abroad and which policy the UWV uses for monitoring reintegration efforts already made.

For foreign employers, it is even more difficult to be fully and correctly at current with the rights and obligations ensuing from the Dutch illness and disability regulations. Due to this, employers often have to rely on paid support information and administrative services, without which they would be insufficiently familiar with the rules or, in any case, their consequences. It often requires a case of actual illness for them to realise how heavy the burden of mandatory continued payment of wages and the other relevant obligations weighs on them.

Employers will not be inclined to enter into similar employment relationships in the future if they find the Dutch obligations regarding illness and disability too strenuous in a cross-border setting. Even employers who previously were not bound by the Dutch social security legislation but are at least partially aware of the extensive obligations involved will think twice before entering into a cross-border employment relationship.

Citizens of the border region who reside in another Member State may be considered a less attractive alternative in times of crisis or excess than employees who reside in the Netherlands.

Employers faced with the choice between an employee who works and resides in the Netherlands and an employee who resides abroad will, with some exceptions, be more inclined towards entering into a 'national' employment relationship than a relationship with a cross-border worker. In this sense, it can be claimed that the measure, i.e. the Dutch illness and disability system, impedes rather than promotes cohesion and that indirect discrimination is lurking around the corner.

Hard data or transparent measurements on missed opportunities cannot be obtained, however.

4. Does the measure promote or impede the sustainable economic development and business climate of the border region?

It is difficult to measure the influence of both Dutch regulations on sustainable economic development and the business climate. Social security, and more specifically illness and disability, are only one part of an employer's entire range of obligations and opportunities. In line with the above sections on the free movement of labour and indirect discrimination, one could claim that these two Dutch regulations constitute an impediment. Such a statement would be too general, however, and would ignore other aspects of cross-border employment such as taxation, accessibility, land, buildings, diplomas, other social security legislation, etc.

It should be pointed out that the Coordination Regulations 883/2004 and 987/2004 devote limited attention to reintegration as part of social security, only mentioning it in two places: Articles 27 and 87 of Regulation (EC) 987/2009. This contrasts sharply with the elaborate regulations on the topic in the Netherlands. In addition, the Regulation does not distinguish between reintegration benefits in cash and benefits in kind. The Dutch legislation does make that distinction. The reintegration effort and benefits in kind play an important role besides the sickness benefits, i.e. the cash benefit based on the obligation for continued payment of wages of Article 7:269 Civil Code and the cash benefit based on the Work and Income according to Labour Capacity Act (Dutch: Wet WIA). The Regulation has been unclear about this so far and remains overly focused on technical solutions for existing benefits in cash without taking into account the benefits in kind.¹⁷ Since sustainable economic development is high on the European agenda, we expect to see more coordination regulations regarding cross-border reintegration from the European legislator.

5. Does the measure promote or impede Euregional cohesion and Euregional governance structures?

Dutch social security is largely determined by the Dutch government's measures of privatising, on the one hand, the Sickness Benefits Act (Ziektewet), thus shifting the responsibility for the period of continued payment of wages to employers and employees, and of turning reintegration during the WIA period, i.e. when the Work and Income according to Labour Capacity Act is effective, into its spearhead on the other hand. The question is whether this focus benefits Euregional cohesion and its governance structures.

The effect on regional *cohesion* is difficult to establish. How much cohesion is achieved or missed out on due to the strict and elaborate Dutch regulations on illness and disability? Here too, both

¹⁷ Th. Erhag, 'Incapacity for work: a national legal concept with cross-national functions', in: S. Devetzi and S. Stendahl (eds.), *Too sick to work? Social Security Reforms in Europe for Persons with Reduced Earnings Capacity*, Alphen aan den Rijn: Kluwer Law International 2011, p.36; see also S. Montebovi, diss.Tilburg 2016, p.296-297.

regulations only constitute a part of the entire social security position and the total package of measures and costs for employers. Multiple aspects are important to cross-border cohesion, so the influence of these two regulations cannot be seen as separate from the entire social security package. It does seem to be the case, however, that the attractiveness of Dutch regulations in a cross-border employment setting is influenced negatively if they are perceived as ‘difficult, expensive, complex, unclear’, etc.

The following can be said of the Euregional *governance structures*: Cooperation with the other EU Member States strongly depends on communication and available information. There is something to be gained here. The Dutch government could reinstate the UWV as the contact point for employers. In addition, the Dutch government should inform the foreign bodies timely and fully on imminent legislative and policy changes. This can be done through network meetings, in addition to the digital and telephone contacts ensuing from concrete dossiers. Moreover, even if there are networks in place, the feasibility of achieving alignment on legislation that is complex or divergent remains an issue. For this reason, it is not only a point of attention for the Dutch government to continue to provide sufficient networking opportunities and support but also to provide legislation which fits the European cross-border pillar of free movement of labour and the notion of Euregional cohesion.

Another question is whether there are currently *more* networks or *better* government support, given that Dutch reintegration legislation is continuously becoming more elaborate and the responsibilities of employers and employees keep growing. This appears not to be the case. The Minister of Social Affairs did pledge, however, to repeal the intended cessation of funding of the Bureaus of Belgian/German Affairs¹⁸ after much unrest and resistance in 2014 and to guarantee their funding until 2018; he also indicated that the (Eu)regional counters are essential.¹⁹

The fact that the coordination regulations regarding reintegration are very limited, comprising only Articles 27 and 87 of Regulation 987/2009, begs the question whether current Dutch reintegration legislation should stimulate more smaller-scale cooperation with those countries with which it has the most mutual cross-border traffic. Does current Dutch legislation present a larger or new challenge to the Benelux countries? Does having (too) few bilateral or multilateral agreements present a problem to cross-border workers and their employers now that Dutch legislation has become so elaborate, specific and strict?

The waiting period of 104 weeks before receiving () disability benefits, which is a direct result of the 104 weeks of continued payment of wages, sometimes causes a gap in the income of relevant employees: employees who worked in several Member States before becoming disabled will receive pro-rata benefits from all Member States involved from the moment the disability starts in those States. If the Dutch portion of the benefits is relatively large, the relevant employees will temporarily be facing a relatively large income gap, induced by the Work and Income according to Labour Capacity Act (Dutch: WIA), as they will not receive this part of their benefits until after two years, i.e. the 104-week waiting period. This bottleneck of different waiting periods inside the EU also has the attention of the European Commission but remains unsolved for the time being.

¹⁸ Both Bureaus are part of the Dutch Social Insurance Bank SVB; see www.svb.nl.

¹⁹ *Kamerstukken II* 2013-2014, 26 448, nr.510 (Dutch Parliamentary Papers II); see also Montebovi (diss.Tilburg) p.364.

6. Conclusions and recommendations from a Euregional perspective

6.1 Substantive conclusions: effects of the sickness and incapacity regulation

The study 'Arbeidsmarkt zonder Grenzen' (Labour Market without Borders) by the Netherlands Environmental Assessment Agency (PBL) and Statistics Netherlands (CBS) shows that the borders between the Netherlands and its neighbouring countries impede the labour market in the border areas.²⁰ The approximately 100,000 cross-border commuters travelling between the Netherlands, Belgium and Germany are only a fraction (5%) of what could be possible. Multiple factors stand in the way of more and better cross-border traffic. Social security is one of them. This cross-border impact assessment has chosen to study the effects of two Dutch social security regulations.

The Dutch regulations on illness, based on Article 7:629 Civil Code, and disability, based on the Work and Income according to Labour Capacity Act (Dutch: Wet WIA), have been substantially altered in the last decade. This was done from a *philosophy of incentive*, striving to activate employees towards a (partial) return to the labour process, even in case of illness. The Dutch government acted from market ideology, thus assigning important roles to private parties, i.e. employers, employees and reintegration companies. This type of reintegration thinking does not exist in other Member States yet. The coordination regulations also provide only limited support for reintegration.

As a consequence, difficult situations may arise for both employers, employees and authorities involved in cross-border situations of illness or disability under Dutch social security legislation. Dutch legislation strongly diverges from what is considered customary or familiar in other Member States, making it more difficult to observe in cross-border situations than in situations of national law. Sometimes employers and employees will strive for and succeed in finding a solution in accordance with Dutch legislation and the UWV Employee Insurance Agency's policy. Sometimes employers and employees are not on the same side, however, with uncertainty about the legislation and policy leading to conflicts. Reliable figures on these situations are not available.

The main bottlenecks are listed below:

- Insufficient knowledge of and understanding for the obligation for continued payment of wages of maximally 104 weeks.
- Insufficient knowledge of and understanding for the reintegration obligation of employers and employees during the period of illness, i.e. the first 104 weeks, in cross-border settings
- Insufficient knowledge of and understanding for the reintegration obligation of employers and employees during the period of disability, i.e. after 104 weeks, in cross-border settings
- Foreign medical reports are not immediately usable for the application of Dutch legislation. Note that physicians in Germany are more focused on reintegration opportunities than their Belgian counterparts, however.
- The UWV Employee Insurance Agency departs from the principle that the Dutch rules should be applied identically both at home and abroad. This proves to be impossible all the time, however, and the principle is not always applied consistently by the UWV Employee

²⁰ A. Weterings en G. van Gessel-Dabekausen, *Arbeidsmarkt zonder grenzen*, PBL en CBS, Den Haag 2015. (*Labour Market without Borders*, Netherlands Environmental Assessment Agency and Statistics Netherlands)

Insurance Agency itself either. In certain situations, for example, the UWV Employee Insurance Agency forgoes its right to receiving a reintegration report, which is a legal requirement. Relevant policy rules are absent and the UWV Employee Insurance Agency does not provide openness on its approach, even after enquiry.

- This customisation on the part of the UWV Employee Insurance Agency leads to legal uncertainty for sick employees and their employers.
- Vigilance is in order to ensure that the free movement of labour is respected; employment subsidies, for instance, or reintegration measures should not depend on the place of residence of the employee.
- Lack of a European reintegration policy
- Lack of a European labour-market policy: no longer give precedence to the 'national' citizens but focus on 'all' persons in the national labour market instead.
- Lack of a cross-border impact assessment of Dutch legislation

6.2 Conclusions regarding the cross-border impact assessment and the further development of the instrument

The ex-post assessment, which has identified effects and bottlenecks, also leaves room for an ex-ante assessment, in which recommendations are made.

The principal solutions are:

- Introduction of a cross-border impact assessment.²¹ Legislative proposals should be tested in advance on their Europe-proofness.
- Reduction of the maximum continued payment of wages of 104 weeks²²
- More attention for bilateral or multilateral agreements. Cross-border traffic between neighbouring countries sometimes benefits from supplementary agreements to the coordination regulations, which are too general and limited to cover reintegration.
- Continue to facilitate existing networks between governmental bodies. The importance of this should not be underestimated. This allows neighbouring countries to further familiarise themselves with each other's mutual legislations, it allows for any changes planned and implemented to be explained in a timely fashion, as well as for seeking personal contact on concrete dossiers.
- Better information provision. Both the government and the UWV Employee Insurance Agency should provide more and clearer information on the Dutch rules, policies and the regular legislative and policy changes. Perhaps the UWV Employee Insurance Agency could again play an important role as the contact point for employers, including during the period

²¹ The plea for cross-border impact assessments recurs with some regularity. Both frontier-worker committees (2001 and 2008) also advocated the introduction of cross-border worker assessments and certain politicians are also convinced of their necessity. See also the dissertation of Montebovi 2016, p.408-409.

²² This reduction is currently on the political agenda. In 2015, the Minister of Social Affairs and Employment commanded several studies into the feasibility and desirability of a reduction of the continued payment of wages. This has not yet led to any concrete legislative proposals. See the dissertation of Montebovi 2016, p.404-406.

of continued payment of wages. Providing good education beforehand can prevent much legal uncertainty afterwards.



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