

Cross-border impact assessment 2018

Dossier 3: Schemes relating to retirement ages in NL/BE/DE: a multidisciplinary analysis



Maastricht University

2018 Cross-Border Impact Assessment

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

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Table of Contents

Abbreviations	1
1. Introduction	2
2. Research Objectives, Definitions, Themes and Indicators	3
2.1 Effects today or in the future, objective: ex-post or ex-ante	3
2.2 The term 'cross-border worker'	5
2.3 Geographical area affected and definition of the 'border region'	5
2.4 Cross-border impacts: what are the research themes, principles, benchmarks and indicators?	6
2.4.1 The research themes of the dossier	6
2.4.2 Dossier 3: What are the principles, benchmarks and indicators for achieving a positive situation in the border regions?	6
3. Overview of retirement ages NL/ BE/ DE	7
4. Most urgent problems due to disparities between retirement ages	10
4.1 Pension incompleteness and pension adequacy	10
4.2 Multiple-state pensioners: a shift in allocation rules	12
4.2.1. The Dutch-German border region: transfer of the tax levy over EUR 15,000	14
4.2.2. The Dutch-Belgian border region: shared tax levy > EUR 25,000	16
4.2.3. Preliminary conclusion	19
4.3. Early retirement issues	19
4.4. Discoordination of taxation and social security	20
4.4.1. Application 1: Social security and tax levies on working pensioners	20
4.4.2. Application 2: Levies on healthcare contributions and the taxation of pensioners	21
4.5. A concrete problem among unemployed Belgians in the Dutch-Belgian context	21
5. Towards potential solutions	23
5.1 Flexibilisation of the retirement age	23
5.1.1 A further increase of the AOW retirement age?	23
5.1.2 Flexibility in AOW retirement age	24
5.1.3 The increase in retirement age for German supplementary pensions (Betriebliche Altersvorsorge)	25
5.1.4 German Flexi-Rente: bringing forward or postponing its start date and the partial pension	26
5.2 Multiple-state pensioners: towards a better coordination of taxation and social security ...	27
5.3 Limiting the authority of the pension state to levy social security contributions or the authority of the state of residence to levy tax	30
5.4. Agreement under Article 16 Regulation (EC) No. 883/2004	31
5.5. Preventative Cross-Border Impact Assessment as part of the legislative process	31
6. Conclusion	31
6.1 Cross-border impact	31
6.2 Future avenues	32

Abbreviations

AltZertG	Altersvorsorgeverträge-Zertifizierungsgesetz (Gesetz über die Zertifizierung von Altersvorsorge und Basisrentenverträgen) (German Pension Act)
AOW	Algemene Ouderdomswet (Dutch State Pension Act)
BE	Belgium
CBS	Centraal Bureau voor de Statistiek (Statistics Netherlands)
DE	Germany
EC	European Commission.
EU	European Union
NL	The Netherlands
RVA	Rijksdienst voor Arbeidsvoorziening (National Employment Office)
SGB	Sozialgesetzbuch (German Social Insurance Code)
SVB	Sociale Verzekeringsbank (Dutch Social Insurance Bank)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union.
Wet LB	Wages and Salaries Tax Act 1964

3. Schemes relating to retirement ages in NL/BE/DE: a multidisciplinary analysis

1. Introduction

Pensions in the border regions continue to demand attention, not merely from a fiscal point of view but also from the perspective of social security and pension law; the field of pensions is multidisciplinary.¹ One of the main pension-related bottlenecks in our border regions are the different retirement ages in The Netherlands, Belgium and Germany. In addition to the fact that cross-border pensions may have different start dates, there may also be adverse consequences for taxation² and social security. It is a discoordination between the measures taken in the states of work and residence that causes problems with cross-border workers' pension rights or benefits. This dossier therefore includes a (multidisciplinary) ex-ante/ex-post analysis of the cross-border impact of the differences in national legislations relating to retirement age in the Netherlands, Belgium and Germany. Its focus will be on statutory (first-pillar) pensions, i.e. the Dutch AOW old age pension, the German *Regelaltersrente* and the Belgian *Rustpensioen*, as well as supplementary (second-pillar) pensions.

There is no European pension legislation within the European Union, nor is there a common European retirement age. The different European Member States each have their own retirement ages for both statutory and supplementary pensions, which differ considerably. Cross-border workers who have worked in different Member States are faced with different start dates and a wide range of options and impossibilities for making these start dates more flexible. As the pensions of cross-border workers comprise several pensions from different Member States, due to their mobility, and each pension has its own start date, the start date of their full pension is determined by the Member State with the highest retirement age.³ As a result, depending on their personal income situation, cross-border workers may face a shortfall in income in the period between leaving the labour market and the pension stage, which may jeopardize the adequacy of the pension as a provision for old age.

A case

The above can be illustrated by an example.⁴ Imagine a 65 year-old cross-border worker (born in 1953) who resides in Belgium, works in the Netherlands and has accrued Dutch and Belgian statutory and supplementary pensions.

¹ ITEM analysed the fiscal impact of the Dutch-German tax treaty on pensions as part of the 2016 Cross-border Impact Assessment, accessible via the ITEM website:

<<https://www.maastrichtuniversity.nl/nl/onderzoek/instituten/item/onderzoek/studie-grenseffectenbeoordeling#report2016>>.

² See also comments OECD model convention, art. 18, par. 8: *"the international mobility of individuals...has significantly increased the importance of cross-border issues arising from the interaction of the different pension arrangements which exist in various States and which were primarily designed on the basis of purely domestic policy considerations"*. In addition, the OECD model convention, art. 18, par. 10 states that: *"Other issues arise from the existence of very different arrangements to provide retirement benefits (i.e. statutory social security schemes, occupational pension schemes, individual pension schemes). The interaction between these three categories of arrangements presents particular difficulties."*

³ Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 314.

⁴ Example taken from: Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 267-268.

If this worker has not worked in the Netherlands as a cross-border worker, he will be assumed to have worked in Belgium, in which case his Belgian legal and supplementary pension start from age 65. If he has worked in the Netherlands, he will not be able to retire until he is 66, effective 2021 (Dutch statutory pension; AOW). Dutch supplementary pensions are targeted to start at age 68. If his Belgian pension is not sufficient, he may decide to work part-time in the Netherlands until he reaches age 68. If this person works in Belgium and has accrued Dutch and Belgian pensions, he can claim his Belgian pension as early as age 62. He will not receive his Dutch statutory pension, however, until he has reached the current Dutch statutory retirement age of 66 years. In October 2017 this age was still 65 years and 9 months, and it will be 67 years and 3 months as of 2022. Assuming that his Belgian and the Dutch pensions are complementary and his Belgian pension is low, this person will more or less be forced to work until the AOW statutory retirement age. This is problematic because he will be legally discharged in Belgium at age 65.

Now imagine a similar cross-border worker who lives in Germany and works in the Netherlands. She will receive her German pension at 65 years and seven months in 2018, assuming, for the sake of simplicity, that the Dutch and German pensions that she has accrued are complementary. If her German pension is insufficient, she may decide to work part-time in the Netherlands until she has reached the AOW statutory retirement age. If this person works in Germany and has accrued both a Dutch and a German pension, she will receive her full German pension in 2018 at 65 years and seven months but will not be able to retire until age 68 in the Netherlands, i.e. in 2021. If her Dutch pension is insufficient, she will be forced to continue to work part-time in Germany. This is problematic, because she will be legally discharged in Germany at the retirement age of 65 years and 7 months.

The above examples illustrate the main problems that cross-border workers encounter when faced with different retirement ages across Member States. After the description of the objective and delineation of the research in Section 2, Section 3 will provide an analysis of the main cross-border impacts of the various legislations on retirement age per Member State. Section 4 addresses the complexity of the matter by categorically tracing the problems. Section 5 seeks to intensify the debate on how to improve the current legal regime and coordination between European social security law and international tax law, so as to create a more suitable legal regime for pensioners in the EU.

2. 2. Research Objectives, Definitions, Themes and Indicators

2.1 Effects today or in the future, objective: ex-post or ex-ante

This dossier contains a (multidisciplinary) ex-ante/ex-post analysis of the cross-border impact of the differences in national legislations on retirement age in the Netherlands, Belgium and Germany. As already noted, the pension field can be assessed from several perspectives: taxation, social security and pensions. The border impact assessment in this dossier requires a multidisciplinary analysis in order to obtain an overview of the cross-border effects that cross-border workers face as a result of the considerable differences in retirement ages across Member States.⁵ One of the grounds for this multidisciplinary analysis is to potentially avoid the discoordination of the tax and social security levies. This multidisciplinary analysis therefore comprises an explanation of the main cross-border effects of

⁵ In line with recommendation 10 from the 'Grenswerkers in Europa' report. See Commissie grenswerkers, *Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken* (Geschriften van de Vereniging voor Belastingwetenschap, p. 314.

the different retirement ages on taxation, social security and pensions. In addition, the analysis includes the relevant legislation at international (e.g. tax treaties), European (e.g. Regulation (EC) No. 883/2004) and national level (e.g. the legislation on retirement ages).

This dossier could not provide a quantitative analysis due to a lack of data on cross-border employment and pensions. Most of the figures on cross-border employment are somewhat dated and not fully representative, since the term 'cross-border worker' was left undefined or used in an inconsistent manner, making it unclear who fell within the definition. In addition, the data on cross-border employment have not been mapped in a coherent way, i.e. their reliability could be called into question, especially when encountering rounded numbers.⁶

For the same reason, i.e. the lack of adequate data collection, it is not possible either to analyse the effects on the sustainable economic development of border regions. As stated in last year's cross-border impact assessment, continuous and coherent monitoring of the cross-border activities of frontier workers is required to obtain a representative picture of the impact of new legislation on their situation. Coherence in the collection of these data will lead to more representative analyses, allowing us to perform a future review of cross-border mobility and, by extension, of the success of the European integration process. There is a great need for cross-border data to further explain the issue at hand and to determine its economic impact. Only then can the effects of (new) legislation on the sustainable economic development of the border regions and the business climate be quantitatively assessed.

In addition, this cross-border impact assessment compensates for a lack of cross-border impact assessment at legislative level by using a coherent tool, which will be explained below under 'Principles, Benchmarks and Indicators. The lack refers to the absence of a separate section that outlines the consequences of the new legislation for cross-border workers. In 2009 and 2012, for example, two motions were tabled requesting permanent attention for the problems of cross-border workers.⁷ In 2015 a number of political parties repeated their desire to have the effects of legislative proposals on the border regions clarified during the legislative process, in the interest of performing a cross-border impact assessment.⁸ Note that, during the parliamentary proceedings of the Dutch-German tax treaty, a separate section on the impact on cross-border workers was added to the Explanatory Memorandum, resulting from the fact that a tax treaty naturally covers cross-border employment, among other things.⁹ In national legislation, on the other hand, cross-border impacts are less prominent and therefore, unfortunately, underexposed in the legislative process. In this context,

⁶ See also the recommendation of the *Commissie grenswerkers, Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap no. 257, Vereniging voor Belastingwetenschap 2017, p. 34.

⁷ *Kamerstukken II 2011/12, 33000 IXB* (motion by Bashir) and *Kamerstukken II 2009/10, 26 834, No. 26* (motion by Weekers) on the importance of paying attention to the problems of cross-border workers. See also *Commissie grenswerkers, Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap pp. 269-270.

⁸ *Handelingen II 2014/15, nr. 50, p. 1 -15* (Cross-Border Impact Assessment).

⁹ *Kamerstukken II 2013/14, 33 615, nr. 3 (MvT)*, section I.4 Grensarbeiders (on cross-border workers). The inclusion of this paragraph reflects the commitment made by former Secretary of State for Finance De Jager to explicitly include the consideration of the consequences for frontier workers in new legislation (see the Cabinet's Opinion on the recommendations by the Frontier Worker Commission, 9 January 2009, 2008/2455 BCPP with reference to *Kamerstukken II 2000/01, 26 834, No. 5*).

the motion tabled by Dutch MP Van der Molen is a positive development.¹⁰ It rightly notes that various studies have shown that national policies often have unintended negative consequences for border regions and that the effects on these border regions are not necessarily being taken into consideration in the development of new policies. The petitioners therefore request an investigation of which legislative and regulative proposals might have disproportionate consequences for border regions, an investigation of the policy effects of several of these proposals, and, based on experience, inclusion of these effects on border regions in the IAK integral impact assessment framework for policy and legislation (hereafter: IAK).¹¹ We support the need for preventative examination of cross-border impact and inclusion of this impact in the IAK in an early stage of the legislative process.

2.2 The term 'cross-border worker'

The following should be noted with regard to the term 'cross-border worker': Dutch parliamentary documents often use the term 'grensarbeiders'.¹² It is unclear whether this includes employment as well as self-employment. This analysis uses the term 'cross-border workers' to designate 'employees', i.e. persons who are employed rather than self-employed.

In addition, the term 'cross-border worker' is meant to include active migrant workers, active cross-border workers and active seconded workers. The term 'non-active cross-border worker', on the other hand, includes retired cross-border workers.

2.3 Geographical area affected and definition of the 'border region'

(Non-active) cross-border workers in the border regions between Belgium, Germany and The Netherlands are faced with the cross-border effects of the disparities between the various schemes regarding the retirement age for both statutory and supplementary pensions. More specifically, those affected are cross-border workers who live and work within a certain distance from the national borders. This report focuses on the relevant political entities, such as the Dutch municipalities, German *Landkreise* or Belgian *Arondissementen* to identify this group.

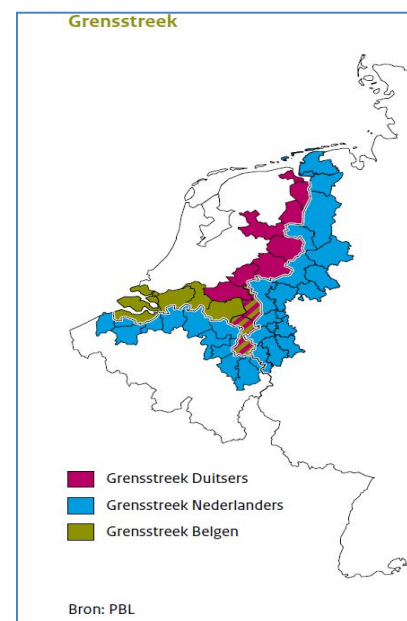


Figure 1: The border region¹³

¹⁰ *Kamerstukken II 2017/18*, 32 851, No. 48 (Modified motion by MP Van der Molen to replace No. 46). Accessible via <https://zoek.officielebekendmakingen.nl/> <https://www.tweedekamer.nl/kamerstukken/moties/detail?id=2018Z10410&did=2018D32053>.

¹¹ The *Integraal Afwegingskader – IAK* (integral impact assessment framework for policy and legislation) is used as a frame of reference for new laws and regulations. Cross-border effects as such are not included in this framework. See <https://www.kcwj.nl/kennisbank/integraal-afwegingskader-beleid-en-regelgeving>.

¹² See for example: *Kamerstukken II 2013/14*, 33 615, No. 3 (MvT), section I.4 Grensarbeiders (on cross-border workers). Please refer to the document *Grenswerkers in Europa* for an explanation of the term 'cross-border worker'. Commissie grensoverschrijdend werken, *Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, par. 1.3.

¹³ Based on PBL (Netherlands Environmental Assessment Agency), *Arbeidsmarkt zonder grenzen*, Den Haag: PBL 2015, p. 48.

2.4 Cross-border impacts: what are the research themes, principles, benchmarks and indicators?

Having defined the underlying problem, i.e. the different retirement ages; the border region; and the term 'cross-border worker' in the previous sections, the sections below provide a description of the research themes of this dossier. Based on the theme of 'European integration', different principles, benchmarks and indicators were selected that can help determine the cross-border effects of having different retirement ages across EU Member States.

2.4.1 The research themes of the dossier

This dossier focuses on the theme of 'European integration', more specifically the free movement of active and non-active cross-border workers, i.e. of labour and persons. Using the ITEM Cross-border Impact Assessment method, this report compares the indicators with the benchmarks. It identifies the levels of tax and social security levies (i.e. an indicator), for example, for multiple-state pensioners, i.e. people with pensions accrued in several (usually two) Member States, and compares them with those for domestic pensioners. This can help establish to what extent the benchmark of an open labour market with good coordination of social security and taxation levies has been achieved. In addition, a comparison of the treatment of a passive cross-border worker and a passive domestic worker in terms of the tax and social security levy will serve to determine the extent to which equality among neighbours (equality in the street) and equality among colleagues (equality in the work state) are guaranteed. These equalities emanate from the free movement of workers, as laid down in art. 45 TFEU, which prohibits the discriminatory treatment of active cross-border workers.

2.4.2 Dossier 3: What are the principles, benchmarks and indicators for achieving a positive situation in the border regions?

Following the descriptions in the previous section, the principles, benchmarks and method of examination can be represented schematically as follows in this report:

Principles	Benchmarks	Method	Indicator
European integration; non-discrimination	Open labour market; good coordination of social security and tax levies	Coordination of tax and social security levies through bilateral treaties and European regulations, respectively.	Cumulation of taxation and social security levies
<i>The free movement of labour pursuant to Article 21 TFEU in conjunction with Directive 2004/38/EC on the right of Union citizens and their family members to move and reside freely within the territories of the Member States, O.J.L. 29 June 2004, [...] 229, 35.</i>	Equality among neighbours (equality in the street)	Comparison between passive cross-border workers and passive domestic workers in terms of taxation, social security and pensions	Adverse treatment of non-active cross-border workers compared to non-active domestic workers

No discriminatory treatment of passive cross-border workers			
<i>The free movement of labour pursuant to Article 45 TFEU:</i> no discriminatory fiscal treatment of active cross-border workers.	Equality among neighbours (equality in the street) Equality among colleagues (equality in the workplace)	Comparison between active cross-border workers and active domestic workers in terms of taxation, social security and pensions	Adverse treatment active cross-border workers compared to active domestic workers
<i>Bilateral tax treaties NL-BE-DE</i> <i>Article 24 tax treaty NL-DE and art. 26 tax treaty NL-BE (identical wording)</i>	No economic double taxation ¹⁴ Non-discrimination	Comparison between (passive) cross-border workers and (passive) domestic workers in terms of taxation	Adverse fiscal treatment of (non-) active cross-border workers in relation to (non-)active domestic workers

The above assessment framework serves as a starting point for the cross-border impact assessment of the schemes relating to retirement ages in the Netherlands, Belgium and Germany. The indicators will enable us to draw conclusions on the cross-border effects of these national legislations.

3. Overview of retirement ages NL/ BE/ DE

Before discussing the analysis of the impact of the disparities between the national schemes regarding retirement age, we will provide an overview of the retirement ages for both the statutory and supplementary pensions per Member State. This will clarify the pension ages faced by cross-border workers who have worked in these Member States.

¹⁴ Economic double taxation occurs when one or two authorities levy tax on one object belonging to two natural persons or bodies or when one or two authorities levy tax twice on formally different yet materially identical objects belonging to one person.'

There is no standard retirement age within the European Union.¹⁵ In addition, there is no coordination of the various schemes regarding retirement age between the European Member States. For cross-border workers, this means that there is no one moment when their pension starts, as it consists of the various pensions accrued in each of their (former) work states. Due to these differences in retirement age, the start date of a cross-border worker's full retirement is determined by the Member State with the highest retirement age. A study of the retirement ages in Belgium, The Netherlands and Germany shows that they vary across Member States. Below is an overview of the national retirement ages per Member State in 2018 for both the statutory and the supplementary pensions. These ages differ significantly between the three Member States, potentially causing cross-border effects.

2018	Statutory retirement age	Retirement age for supplementary pensions	Flexibilisation options
Belgium	<i>Rustpensioen:</i> age 65 (until 2024); age 66 ¹⁶ as of 2025; age 67 ¹⁷ as of 2030	<ul style="list-style-type: none"> - From the moment the statutory pension becomes effective; - Exception: worker who continues working after the statutory retirement age or the age at which the conditions for early retirement are met (must be expressly included in the pension regulations). In these cases, workers can also request payment of their supplementary pensions, even if they aren't retiring yet. 	<i>Rustpensioen:</i> Early retirement ¹⁸ : a career of at least 41 years at age 62.5 <i>Supplementary pension:</i> None

¹⁵ Let alone whether this would be desirable or even possible at European level.

¹⁶ Those affected by the legislative amendment were born in or after 1960.

¹⁷ Wet van 10 augustus 2015 tot verhoging van de wettelijke leeftijd voor het rustpensioen en tot wijziging van de voorwaarden voor de toegang tot het vervroegd pensioen en de minimumleeftijd van het overlevingspensioen, *BS* 21 augustus 2015.

¹⁸ Statutory retirement before the statutory retirement age.

Netherlands	age 66 ¹⁹	age 68 ²⁰	<p><i>Statutory pension:</i> None</p> <p><i>Supplementary pension rights:</i></p> <p>Earlier start date: possible in combination with actuarial lowering of the pension amount.²¹</p> <p>Later start date: possible in combination with actuarial increase in the pension amount.²²</p> <p>Maximised at 5 years after reaching AOW retirement age.²³</p>
Germany	<p><i>Regelaltersrente:</i></p> <p>Born before 1 January 1947: age 65²⁴</p> <p>Born after 31 December 1946 but before January 1964: a gradual increase of the age limit from 65 to 67 years²⁵</p>	<p>The supplementary pension schemes, the most common of which are <i>Direktusage, Direkt Versicherung, Support Checkout, Pensionskasse, Pensionsfonds</i>, cannot disburse before the pensioner reaches the age of 62 years if the pension entitlements were granted after 1</p>	<p><i>Regelaltersrente:</i> Flexi-Rente²⁸</p> <p>All insured persons have the option to take a partial pension.²⁹</p> <p>Certain categories of insured persons can apply for early <i>Regelaltersrente</i> against a lifelong reduction.³⁰</p> <p><i>Supplementary pension:</i> none</p>

¹⁹ Ex. art. 7a(1) g) Algemene Ouderdomswet (AOW - General Old Age Pensions Act): ‘De pensioengerechtigde leeftijd in 2018: 66 jaar’ (‘Retirement age in 2018: 66 years’). The AOW retirement age will increase further according to a formula laid down in paragraph 2 of this Article. It will increase incrementally to 67 years in 2021 .

²⁰ Ex. art. 18a(6) Wet LB 1964 (Income Tax Act of 1964). Note that, even after 1 January 2018, pension schemes can still include a target retirement age lower than 68, provided that the size of the old age pension to be accrued does not exceed the fiscally maximum old age pension starting on the first day of the month when the age of 68 is reached and as recalculated for the lower target retirement age on the basis of generally accepted actuarial principles. See Vraag & Antwoord 17-012 d.d. 100118 (Pensioenrichtleeftijd lager dan 68 jaar vanaf 1 januari 2018), accessible via https://www.belastingdienstpensioensite.nl/VA_17-012_v180110.htm.

²¹ Ex. 18a(6) Wet LB 1964 (Income Tax Act 1964).

²² Ex. art. 18a(5) Wet LB 1964 (Income Tax Act 1964).

²³ Ex. art. 18a(4) Wet LB 1964 (Income Tax Act 1964).

²⁴ Under transitional law as laid down in Section 235, paragraph 2 SGB VI. Some categories have a lower retirement age; see Section 37 SGB VI for the severely disabled (65 years), Section 38 SGB VI for particularly long-term insured persons (65 years) and Section 40 SGB VI for miners (62 years). The *Deutsche Rentenversicherung* pension fund has developed a tool to calculate the legal retirement age: https://www.deutsche-rentenversicherung.de/Allgemein/de/Navigation/5_Services/02_online_dienste/03_online_rechner_nutzen/rentenbeginn_hoehenrechner/Rentenbeginnrechner_node.html.

²⁵ Ex. Section 235, par. 2 SGB VI.

²⁸ Gesetz zur Flexibilisierung des Übergangs vom Erwerbsleben in den Ruhestand und zur Stärkung von Prävention und Rehabilitation im Erwerbsleben“ (Flexirentengesetz). See also https://www.deutsche-rentenversicherung.de/Allgemein/de/Navigation/5_Services/01_kontakt_und_beratung/02_beratung/03_haeufige_fragen/12_flexirente_node.html. This measure enables partial early retirement - between 63 and 67 years - or to continue working after reaching the retirement age. For a comprehensive account of the *Flexi-Rente*, see: https://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/5_Services/03_broschueren_und_mehr/01_broschueren/01_national/flexirente_das_ist_neu_fuer_sie.pdf?_blob=publicationFile&v=17.

²⁹ Ex. Section 42 SGB VI.

³⁰ Ex. Section 36 SGB VI for long-term insured persons (from 63 years), § 37 SGB VI for the severely disabled (from 62 years).

	Born after July 1964: age 67 ²⁶	January 2012. ²⁷ Pension entitlements granted before 31 December 2011 are payable from the age of 60 years.	
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4. Most urgent problems due to disparities between retirement ages

4.1 Pension incompleteness and pension adequacy

Cross-border workers have typically worked in several Member States. One of the main implications of this is the fragmentation of their pension entitlements. A cross-border worker, for example, who has worked in the Netherlands, Belgium and Germany, has accrued pension entitlements in each of these Member States according to different national pension schemes. Due to the differences in retirement age between the Member States, cross-border workers are faced with a high administrative burden in their former work states and countries of origin, e.g. filling out two tax declarations. As tax subjects, they are exposed to great legal uncertainty about their net pension income because their social security levies are payable in one Member State and their taxes in another.

Cross-border workers who receive retirement pensions from several Member States - in this report: from NL/BE/DE - and at different start dates, may wonder when they will ever have a full pension, with 'full' meaning: composed of the various pensions from the different Member States. Cross-border workers depend on the Member State with the highest retirement age for receiving a full pension. The table above shows that this is the Netherlands. The disparities in retirement age imply that cross-border workers who have accrued a statutory pension in the Netherlands and in Belgium and/or Germany will have to wait a bit longer for their AOW benefits when they start receiving their foreign statutory pensions. The different start dates and forced wait for their AOW pensions can affect the net disposable income of the pensioners negatively.³¹ In addition, it should be noted that this problem is made even more complex by the overlap of statutory and supplementary pensions and the related (im)possibilities to achieve flexibility. The above table shows that the supplementary pension age may differ from the statutory retirement age.

The unemployed cross-border workers mentioned earlier may get caught between ship and shore due to the differences in retirement age between the Member States and (partly) due to the absence of a common EU retirement age (insofar as attainable)³², effectively leaving cross-border workers without income for a period of time. The disparities between the different retirement ages can thus lead to

²⁶ Ex. Section 35 SGB VI.

²⁷ Ex. Section 1, par. 2, sub 2 AltZertG.

³¹ For examples, please refer to the ITEM Cross-border Impact Assessment 2016, Dossier 7 on the *Wet Flexibilisering ingangsdatum AOW* (Flexible AOW Start Date Act):

https://www.maastrichtuniversity.nl/sites/default/files/nl_item_grenseffectenrapportage_2016_versie_2.1.pdf.

³² It is unlikely, after all, that there will ever be EU pension legislation.

incomplete pensions.³³ Cross-border workers in Belgium, for example, who have already retired and were previously insured in the Netherlands will receive incomplete pensions until they reach the pensionable age in the Netherlands. Whether they can maintain their standard of living on this Belgian pension alone depends on their individual income situations. In some individual cases, however, it is conceivable that the temporary lack of a full pension - while waiting for the Dutch pension - leads to situations in which retired cross-border workers are unable to maintain their standard of living. In such situations, a partial pension may be an inadequate pension, even though the provision of an adequate pension income for EU citizens is a present and future EU priority.³⁴ An inadequate pension generally refers to a retirement provision that does not allow pensioners to maintain their standard of living after retirement. An estimated 2,000 former cross-border workers are in this position.³⁵

Alongside this fragmentation of pension entitlements across their various former or present work states, cross-border workers lack an overview of their statutory and supplementary pensions. Cross-border workers initially have no insight into the different retirement ages per pension, per Member State. It is up to each Member State whether or not to offer this insight into the present state of people's pensions. Cross-border workers find it difficult to discover which retirement ages apply to them, which may leave them in the dark as to when they can start taking their pension.

In addition, cross-border workers, lacking the full overview, are unable to judge whether their pension will be sufficient to maintain their standards of living after retirement. Moreover, they are not in a position to judge whether working longer or saving extra for retirement are necessary to ensure an adequate income after retirement.³⁶ As tax subjects, they are exposed to great legal uncertainty about their net pension incomes because their social security levies are payable in one Member State and their taxes in another. This is why a cross-border or European pension register is necessary: to allow cross-border workers to obtain a clear and accurate overview of their cross-border pension accruals, to offer them an action perspective³⁷ and to secure adequate incomes for these cross-border workers after retirement. This pension register would show cross-border workers which pensions are due from whom and when.³⁸ Since the retirement age differs across the EU, this would provide cross-border workers with an overview of retirement ages per receivable pension scheme.

Such a pension register would be a positive impulse for the labour mobility of workers. The EC already stressed the relevance of a European pension register in its Green Paper on Pensions, acknowledging

³³ Providing an adequate pension income for EU citizens now and in the future is a priority for the European Union. See European Commission, Green Paper: Towards adequate, sustainable and safe European pension systems, COM(2010)365, p. 2.

³⁴ See European Commission, Green Paper: Towards adequate, sustainable and safe European pension systems, COM(2010)365, p. 2. It is generally difficult to establish, moreover, what constitutes a quantitatively adequate pension. An adequate level depends on the pensioner's personal situation, including the standard of living, and other sources of income, such as income from a personal pension product or from assets. In addition, the pension levels accrued within each pension scheme vary so strongly across Member States that it is generally difficult to determine an adequate level.

³⁵ <https://www.maastrichtuniversity.nl/nl/blog/2017/10/het-belang-van-een-flexibele-aow-ingangsdatum>

³⁶ See European Commission, Green Paper: Towards adequate, sustainable and safe European pension systems, COM(2010)365, p. 12. Once again confirmed by EC in European Commission White Paper: an agenda for adequate, safe and sustainable pensions, COM(2012)55, p. 14.

³⁷ The term 'action perspective' refers to the ability to assess whether there are any gaps in the accrual of pension rights and whether working longer or saving extra for retirement is necessary to ensure an adequate income after retirement.

³⁸ A. Bollen, 'Grensoverschrijdende fiscale organisatie van pensioenen', 2016, p. 25, accessible via: https://cris.maastrichtuniversity.nl/portal/files/7250276/CBS_12079_Oratieboekje_Anouk_Bollen_Single_page.pdf.

the importance of the development and implementation of this type of information provision.³⁹ In this context, the TTYPE consortium launched 'Track and Trace your pension in Europe', an attempt to create one large European Tracking Service (ETS) in which all the Member States participate.⁴⁰ The wide diversity in pension systems within the EU may be a reason to consider such a European pension register on a smaller scale, e.g. between the Netherlands, Belgium and Germany.⁴¹

4.2 Multiple-state pensioners: a shift in allocation rules

The differences in the retirement age per Member State can cause undesirable situations in practice. A case in point are the multiple-state pensioners, i.e. those who receive pensions from two Member States. Given the disparities in retirement age across Member States, some time will elapse between pensioners' receiving their first and their second pension. As long as these cross-border workers receive only one pension, they qualify as 'single-state pensioners'. From the moment, however, that they start receiving their second pension, they qualify as multiple-state pensioners. This transition from single to multiple-state pensioner may be accompanied by a temporary transfer of authority in matters of social security. The legal situation of these cross-border workers in terms of taxation and social insurance thus changes as a result of the disparities in the retirement age. The issue of multiple-state pensioners in the Dutch-German and Dutch-Belgian border regions is explored below.

Token entry: the tax and social security levies on pensions

The tax levy on pensions

To ensure a proper understanding of the problems, the tax and social security levy regulations are briefly discussed first.

Taxation of cross-border pensions typically takes place through an exclusive levy in the state of residence.⁴² The OECD Model Convention does not provide for statutory pensions, such as the Belgian *Rustpensioen*, the German *Regelaltersrente* and the Dutch AOW pension. These statutory pensions fall under other provisions, laid down in Article 21 of the OECD Model Convention, which arranges for exclusive taxation in the state of residence. As per Article 19 of the OECD Model Convention and following the Kass Tate principle, the taxation of the state pension is allocated to the state that provides the pension (hereafter: the 'pension state').

An increasing number of states are switching to source state levying when it comes to cross-border pensions. If social security contributions were charged to the taxable income in the past, the state that offers these social security services wishes to see a 'return' by taxation of the pension. This is true for the Netherlands-Belgium tax treaty of 2001, the Netherlands-Germany tax treaty of 2012 and the Netherlands-Portugal tax treaty of 1999. Striking is the inclusion of a source state levy above a certain

³⁹ White Paper, An agenda for adequate, safe and sustainable pensions, COM(2012)55 final, par. 3.2.

⁴⁰ See also the final report of the TTYPE consortium: <http://ttype.eu/reports/>.

⁴¹ A. Bollen, 'Grensoverschrijdende fiscale organisatie van pensioenen', 2016, accessible via: https://cris.maastrichtuniversity.nl/portal/files/7250276/CBS_12079_Oratieboekje_Anouk_Bollen_Single_page.pdf.

⁴² Article 18 of the OECD Model Convention.

amount: EUR 25,000 EUR 15,000 and EUR 10,000, respectively. Amounts below these limits are subject to a levy in the state of residence. It is not entirely clear why the amounts set out in the treaties differ.

Social levy on pensions

As regards the social security levies on pensions, Regulation (EC) No. 883/2004 stipulates that economically non-active pensioners are insured in their state of residence, where they pay contributions and are entitled to all medical benefits in kind and in cash (*lex loci domicilii*).⁴³ For the specific social security risk of illness, the EU legislator has opted for different allocation rules⁴⁴, however, which take precedence over the general allocation rules.⁴⁵ Pensioners concerned only pay premiums or contributions in their pension state. A number of Member States offers these pensioners the right to seek medical treatment in their pension states (right of option).⁴⁶

The decision which Member State, i.e. the pension state, is authorised to levy the costs and the healthcare contributions is made as follows:⁴⁷ pensioners who receive one or more pensions based on the legislations of two or more Member States, including the state of residence, and who are entitled to benefits under the legislation of the state of residence, must receive healthcare from the relevant institution of that Member State, i.e. health insurer/insurance, which must also bear the cost, as if the pensioner solely had a pension in that Member State.⁴⁸ Pensioners living in Belgium with pensions from both The Netherlands and Belgium are thus entitled to healthcare in Belgium.⁴⁹

Pensioners who receive pensions from one or more Member States and are not entitled to healthcare under the legislation of their state of residence have the right to receive healthcare in their state of residence, provided that they would be entitled to this care in one or more of the Member States that provide their pensions if they resided there.⁵⁰ Those involved are therefore entitled to healthcare in the Member State of residence as if they had been entitled to a pension and healthcare under the legislation of that Member State. Article 24, paragraph 2 Regulation (EC) No. 883/2004 specifies the 'pension state' that must bear the costs. Where the pensioner is entitled to a pension in a single Member State, the cost of medical care in the pensioner's state of residence must be borne by the competent institution of that Member State. Where the pensioner is entitled to pensions in two or more Member States, other than the state of residence, the cost of medical care shall be borne by the competent institution of the Member State to whose legislation the person has been subject for the longest period of time. A pensioner with a Dutch and a German pension, for example, who resides in Belgium without receiving a Belgian pension is entitled to healthcare benefits in Belgium, even though this Member State is not the competent state. The competent state is the Member State where the

⁴³ Article 11, paragraph 3, item e Regulation (EC) No. 883/2004.

⁴⁴ Art. 23 to 30 Regulation (EC) No. 883/2004.

⁴⁵ ECJ 14 October 2010, C-34 5/09, ECLI:EU:C:2010:610, *NFR*2010/2443, with notes by J.C.L.M. Fijen (*Van Delft et al.*).

⁴⁶ These Member States are listed in Annex IV to Regulation (EC) No. 883/2004.

⁴⁷ Note that Article 25 Regulation (EC) No. 883/2004 contains another special provision for pensioners who reside in a Member State where the right to healthcare benefits is not contingent on insurance or the performance of economic activities.

⁴⁸ Article 23 Regulation (EC) No. 883/2004.

⁴⁹ See also G. Essers and M. Weerepas, 'Grensoverschrijdende pensioenen: gebrek aan samenhang tussen fiscale en sociale heffingen', *TPV* 2017, 35.

⁵⁰ Article 24, paragraph 1 Regulation (EC) No. 883/2004.

pensioner (has) had social security insurance for the longest period of time (here: the Netherlands or Germany).

4.2.1. The Dutch-German border region: transfer of the tax levy over EUR 15,000

The Dutch-German tax treaty includes shared levying rights, despite Dutch efforts to achieve an unconditional source state levy on pensions accrued through tax facilitation⁵¹. In principle, (private) pensions are levied in the state of residence.⁵² Note that pensions and other benefits paid under the provisions of a social security scheme established by the legislation of a Contracting State, i.e. social security pensions, are only taxable in the pension state.⁵³ The pension can also be levied in the source state, however, if the total gross amount in pensions or similar remunerations, annuities or social security pensions exceeds the sum of €15,000 in any calendar year. In these cases, the components of the pension already levied in Germany (as source state) are exempt from taxation in the Netherlands through a tax reduction, i.e. the settlement method.⁵⁴ This reduction is calculated in accordance with the provisions in the *Besluit voorkoming dubbele belasting 2001*, the Dutch legislation to avoid double taxation.

Due to these shared levying rights between the Netherlands and Germany, the fiscal levying of a pensioner who lives in The Netherlands with only a German pension will shift from The Netherlands to Germany as soon as the aggregate gross pension amount exceeds EUR 15,000. A possible explanation of these unwanted shifts in levying rights are the differences in subjective and objective scope of bilateral tax treaties and European Regulation 883/2004, as bilateral tax treaties pertain to the divisible incomes of persons and Regulation No. 883/2004 to indivisible insured persons.⁵⁵ These situations can be illustrated with a practical example.

Example

The effect of the discoordination can be illustrated through an example in the following table. A Dutch cross-border worker (born on 1 January 1952) worked in Germany for some time, then spent the rest of her working life in the Netherlands. While working in Germany, she accrued rights to a statutory pension from the *Gesetzlichen Rentenversicherung (Regelaltersrente)* and a supplementary pension from a *Pensionskasse*. The gross amount in joint German pensions is less than EUR 15,000. The *Regelaltersrente* from the *Gesetzlichen Rentenversicherung* has a retirement age of 65 years and 6 months.⁵⁶ This means that she has already been receiving this pension since 1 July 2017. She also chose the same start date for disbursement of her German *Pensionskasse* pension.⁵⁷ At that time, this cross-border worker qualified as a single-state pensioner, and the authority to tax the German pension was granted to the Netherlands.⁵⁸ The social security levy, on the other hand, was allocated to Germany.⁵⁹ Equal treatment in the state of residence is thus no longer guaranteed. This retired cross-border

⁵¹ Note Tax Treaty Policy 2011, p. 54. 'Unconditional' refers to a source state levy that is independent of the fiscal treatment of pensions in the pensioner's (new) state of residence.

⁵² Ex. art. 17(1) Tax Treaty Netherlands-Germany. Accessible via <http://wetten.overheid.nl/BWBV0005862/2016-12-31>.

⁵³ Ex. art. 17(1) Tax Treaty Netherlands-Germany.

⁵⁴ Ex. art. 22(2)(b), Tax Treaty Netherlands-Germany.

⁵⁵ G.J.C. Essers en M.J.G.A.M. Weerepas, 'Grensoverschrijdende pensioenen: gebrek aan samenhang tussen fiscale en sociale heffingen', *TPV* 2017/35, p. 16, footnote 33.

⁵⁶ Ex. Section 235 Tracks 2 SGB VI.

⁵⁷ Which is permitted pursuant to Section 1, para. 2, sub 2 AltZertG.

⁵⁸ Ex. art. 17(1) Tax Treaty Netherlands-Germany.

⁵⁹ Ex. art. 24 Regulation 883/2004

worker is treated adversely compared to retired domestic workers, i.e. those who chose not to work across the border. If this retired cross-border worker residing in The Netherlands solely received a German pension that exceeded EUR 15,000, the authority to tax would be transferred from The Netherlands to Germany. In this event, there would be no equal treatment in the state of residence (i.e. in the street), but there would be in the pension state (i.e. in the workplace: compared to former colleagues in Germany). This illustrates how the shared levy affects the extent to which non-active cross-border workers are treated equally with domestic non-active workers.

When this cross-border worker reaches the AOW retirement age of 66 years, on 1 January 2018⁶⁰, she will receive his Dutch statutory pension as well, including the option to also have any Dutch supplementary pensions disbursed on the same date⁶¹. This would, however, lead to the actuarial adjustment and lowering of the amount of supplementary pension. This constitutes the flexibility option for Dutch supplementary pensions, whereby this cross-border worker will receive a full pension on 1 January 2018 instead of having to wait until 2020, i.e. the year in which she reaches the age of 68 years. As of 1 January 2018, this retired cross-border worker will qualify as a multiple-state pensioner as she will be receiving a German and Dutch pension from that time. If the gross total German pension is less than EUR 15,000, the tax levy is allocated to the Netherlands as the state of residence.⁶² In that case, the social security levy is allocated to Germany. The equal treatment of cross-border workers is thus not guaranteed, and nothing has changed compared to the situation of a single-state pensioner. If she receives a total German pension of more than EUR 15,000, however, the tax levy is shared between the Netherlands and Germany, while the Netherlands is authorised to levy the social security contributions. Even this situation does not lead to the equal treatment of cross-border workers. It has changed, however, compared to the situation of a single-state pensioner: in addition to the fact that the tax levy is now shared between the Netherlands and Germany, the social security levy has transferred from Germany to the Netherlands.⁶³ Where the single-state pensioner residing in the Netherlands with only a German pension of more than EUR 15,000 at least received equal treatment in the pension state, there is no equal treatment whatsoever for the double-pensioner residing in the Netherlands with a Dutch pension and a German pension of more than €15,000.

Application⁶⁴

Living in The Netherlands with only a German pension greater or less than EUR 15,000			
Living in The Netherlands with only a German pension < EUR 15,000		Living in The Netherlands with only a German pension > EUR 15,000	
Tax Levy	Social Levy	Tax Levy	Social Levy
Netherlands	Germany	Germany	Germany
No equal treatment		No equal treatment in the state of residence; equal treatment in the pension state	

⁶⁰ Ex. art. 7a(1)(g) General Old Age Pensions Act: 'De pensioengerechtigde leeftijd in 2018: 66 jaar.' ('Retirement age in 2018: 66 years.')

⁶¹ Ex. 18a(6) Wet LB 1964 (Income Tax Act 1964).

⁶² Ex. art. 17(1) Tax Treaty Netherlands-Germany.

⁶³ Ex. art. 23 Regulation (EC) No. 883/2004,

⁶⁴ The content of these tables is based on Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 284 et seq. See also the table in G.J.C. Essers and M.J.G.A.M. Weerepas, 'Grensoverschrijdende pensioenen: gebrek aan samenhang tussen fiscale en sociale heffingen', *TPV 2017/35*, p. 16.

Living in Germany with only a Dutch pension greater or less than EUR 15,000			
Living in Germany with only a Dutch pension < EUR 15,000		Living in Germany with only a Dutch pension > EUR 15,000	
Tax Levy	Social Levy	Tax Levy	Social Levy
Germany	Netherlands	Netherlands	Netherlands
No equal treatment		No equal treatment in the state of residence; equal treatment in the pension state	

Living in The Netherlands with a German pension greater or less than EUR 15,000 and a Dutch pension			
Living in The Netherlands with a German pension < EUR 15,000 and a Dutch pension		Living in The Netherlands with a German pension > EUR 15,000 and a Dutch pension	
Tax Levy	Social Levy	Tax Levy	Social Levy
Netherlands	Germany	The Netherlands and Germany (shared levy)	Netherlands
No equal treatment		No equal treatment	

Living in Germany with a Dutch pension greater or less than EUR 15,000 and a German pension			
Living in Germany with a Dutch pension < EUR 15,000 and a German pension		Living in Germany with a Dutch pension > EUR 15,000 and a German pension	
Tax Levy	Social Levy	Tax Levy	Social Levy
Germany	Netherlands	The Netherlands and Germany (shared levy)	Germany
No equal treatment		No equal treatment	

4.2.2. The Dutch-Belgian border region: shared tax levy > EUR 25,000

The Dutch-Belgian tax treaty provides for a shared levy, i.e. a source state levy subject to special provisions, despite Dutch efforts to achieve an unconditional source-state levy on pensions accrued through fiscal facilitation⁶⁵. In principle, (private) pensions are levied in the state of residence.⁶⁶ Note that pensions and other benefits paid under the provisions of a social security scheme established by the legislation of a Contracting State (social security pensions) are only taxable in the state of residence.⁶⁷

Pensions can also be taxed in the source state under certain (cumulative) conditions:⁶⁸ first of all, the pensions must have been subject to tax facilitation in the source state, i.e. tax exemption for pension

⁶⁵ Notitie Fiscaal Verdragsbeleid 2011, p. 54. 'Unconditional' refers to a source state levy that is independent of the fiscal treatment of pensions in the pensioner's (new) state of residence.

⁶⁶ Ex. art. 18 (1)(a), Belastingverdrag Nederland-België (Netherlands-Belgium Tax Treaty). Accessible via https://download.belastingdienst.nl/belastingdienst/docs/verdrag_nl_be.pdf.

⁶⁷ Ex. art. 18(1)(b), Belastingverdrag Nederland-België (Tax Treaty Netherlands- Belgium).

⁶⁸ Ex. art. 18(2) Tax Treaty Netherlands- Belgium. Note that this source state levy subject to special provisions is in line with the Commentary on the OECD model convention, art. 18, par. 15 (d).

entitlements, fiscal deduction of pension contributions or other means of tax facilitation.⁶⁹ Secondly, the pension must not be levied in the state of residence at the general tax rate for income from non-autonomous professions, nor must the levy involve less than 90% of the gross pension.⁷⁰ The final requirement is that the gross total pension per calendar year must exceed EUR 25,000.⁷¹ In this event, the components of the pension already levied in Belgium (as source state) will be tax exempt in the Netherlands through a tax reduction under the settlement scheme.⁷² This reduction is calculated in accordance with the provisions in the *Besluit voorkoming dubbele belasting 2001*, the Dutch legislation to avoid double taxation. To this end, the components mentioned shall be considered part of the income or asset components exempt from Dutch taxation under those provisions.

This conditional source state levy has led to double taxation of cross-border workers in the recent past.⁷³ Because the Netherlands believed that pensions were being insufficiently levied in Belgium, it repealed all income tax exemptions for pensioners with a Dutch pension living in Belgium. This led to the double taxation of retired frontier workers. The Netherlands and Belgium have agreed, however, that the Netherlands will not levy any tax on pensions from the Netherlands if Belgium actually and sufficiently levies these pensions.⁷⁴ The Netherlands will be allowed to levy where this is not the case, and Belgium will refrain from double taxation. In addition, arrangements were made regarding the exchange of information between the Netherlands and Belgium, so that The Netherlands now knows the situations where pensions are actually and sufficiently levied in Belgium as well as those where they are not. These agreements help avoid situations of double taxation as well as of double non-taxation, which is the objective of tax treaties.⁷⁵

Example

The effect of this discoordination on the relationship between the Netherlands and Belgium can be illustrated by the following example: a (former) Dutch cross-border worker (born on 1 January 1952) worked in the Netherlands for some time, then spent the rest of his life working and residing in Belgium. When working in The Netherlands, he accrued statutory AOW pension and supplementary pension rights with an industry pension fund. The gross amount in joint Dutch pensions is less than EUR 15,000.

⁶⁹ Ex. art. 18 (2)(a), Belastingverdrag Nederland-België (Tax Treaty Netherlands-Belgium).

⁷⁰ Ex. art. 18(2)(b), Belastingverdrag Nederland-België (Tax Treaty Netherlands-Belgium).

⁷¹ Ex. art. 18(2)(b), Belastingverdrag Nederland-België (Tax Treaty Netherlands-Belgium).

⁷² Ex. art. 23(2)(b), Belastingverdrag Nederland-België (Tax Treaty Netherlands-Belgium).

⁷³ As already cited in the Note on tax treaty policy 2011, p. 54: *'daarvoor is ook van belang dat inmiddels ervaring is opgedaan met de in de eerder genoemde ten tweede genoemde regeling (al dan niet gedeeltelijke, bronstaatheffing), waarbij de toewijzing van het heffingsrecht mede afhankelijk is van de fiscale behandeling van het pensioen in het woonland van de pensioengerechtigde en welke ervaring heeft geleerd dat het in de praktijk niet eenvoudig is inzicht te krijgen in de wijze van belastingheffing in bedoeld woonland.'*

(‘It is also important, in this context, that experience has meanwhile been gained with the scheme of full or partial source state tax, previously mentioned as the second scheme, whereby the allocation of the tax levy depends, among other things, on the fiscal treatment of the pension in the pensioner’s country of residence. This experience has shown that, in practice, it is not easy to gain insight in the procedure for levying tax in the relevant country of residence.’)

⁷⁴ This agreement can be accessed via <https://zoek.officielebekendmakingen.nl/stcrt-2018-17744>. See also the Letter to Parliament: <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/02/23/kamerbrief-afpraak-tussen-nederland-en-belgie-over-pensioenproblematiek>.

⁷⁵ See also the policy of the Dutch tax authorities: <https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/berichten/nieuws/pensioengerechtigden-belgie-met-nederlands-pensioen-wijziging-ingetrokken-verdragsverklaringen>. See also the ITEM news release <https://www.maastrichtuniversity.nl/nl/nieuws/item-einde-aan-dubbele-belasting-van-pensioenen-grensarbeiders>.

The Belgian statutory *Rustpensioen* has a retirement age of 65 years. This means that he has already been receiving this pension as of 1 January 2017, qualifying as a single-state pensioner since that time. The tax levy has been allocated to the Netherlands⁷⁶, the social security levy to Belgium⁷⁷. Equality in the state of residence is thus no longer guaranteed. When this cross-border worker reaches the AOW retirement age of 66 years, on 1 January 2018⁷⁸, he will receive the Dutch statutory pension as well, with the option to have any Dutch supplementary pension also disbursed on that date⁷⁹. This would, however, lead to an actuarial lowering of the supplementary pension, constituting a disproportionate reduction. This is a flexibility option for Dutch supplementary pensions, in that the cross-border worker will now receive a full pension on 1 January 2018 instead of having to wait until 2020, when he reaches the age of 68 years. The benefit of setting a single retirement date is offset by a certain reduction in the amount of the Dutch supplementary pension, which may jeopardise the adequacy of the full pension. In opting for a single retirement date, this cross-border worker qualifies as a multiple-state pensioner as of 1 January 2018, as he now receives a Belgian and a Dutch pension. In such cases, the tax levy generally remains in the Netherlands.⁸⁰ The levy of social security contributions, however, transfers from Belgium to the Netherlands.⁸¹ So far, this constitutes equality of treatment in the state of residence. Belgium can also levy, however, if the Dutch pension exceeds EUR 25,000 and the other terms and conditions of the conditional source state levy have been met. The Netherlands must then use the settlement scheme to prevent double taxation of the pension components already taxed in Belgium.⁸² This situation is known as shared levying. It constitutes partial equal treatment in the state of residence, i.e. as to the social security levy (in the Netherlands) and the levy on the Dutch pension (in the Netherlands). The Belgian side of the tax levy, however, treats these retired cross-border workers adversely compared to retired domestic workers, i.e. those who chose not to work across the border. This illustrates how the shared levy affects the extent to which non-active cross-border workers are treated equally with domestic non-active workers.

Application⁸³

Living in The Netherlands			
Living in The Netherlands with only a Belgian pension		Living in The Netherlands with a Dutch and a Belgian pension	
Tax Levy	Social Levy	Tax Levy	Social Levy
Netherlands	Belgium	Netherlands	Netherlands
No equal treatment		Equal treatment in the state of residence	

⁷⁶ Ex. art. 18(1) Tax Treaty Netherlands-Belgium.

⁷⁷ The economically non-active (i.e. pensioners) are subject to the *lex loci domicilii* on the basis of art. 11, paragraph 3, item e, Regulation No. 883/2004.

⁷⁸ Ex. art. 7a(1), sub g Algemene Ouderdomswet (General Old Age Pensions Act): 'De pensioengerechtigde leeftijd in 2018: 66 jaar.' ('Retirement age in 2018:66 years.')

⁷⁹ Ex. 18a(6) Wet LB 1964 (Income Tax Act 1964).

⁸⁰ Ex. art. 18(1) Tax Treaty Netherlands-Belgium.

⁸¹ Ex. art. 23 Regulation (EC) No. 883/2004, See also G.J.C. Essers and M.J.G.A.M. Weerepas, 'Grensoverschrijdende pensioenen: gebrek aan samenhang tussen fiscale en sociale heffingen', TPV 2017/35, p. 14.

⁸² Ex. art. 18 (2) j° section 23(2)(b), Belastingverdrag Nederland-België (Tax Treaty Netherlands-Belgium).

⁸³ Contrary to the table on the NL-DE relationship, this table does not include the scenario of a shared levy between source state and state of residence - ex. art. 18(1) Tax Treaty Netherlands-Belgium. Contrary to the shared levy in the NL-DE tax treaty, the NL-BE tax treaty contains a conditional source state levy. This conditional source state levy is subject to the conditions identified above. It has not been included in this table as it only pertains to exceptional situations.

Living in Belgium			
Living in Belgium with only a Dutch pension		Living in Belgium with a Dutch and a Belgian pension	
Tax Levy	Social Levy	Tax Levy	Social Levy
Belgium	Netherlands	Belgium	Belgium
No equal treatment		Equal treatment in the state of residence	

4.2.3. Preliminary conclusion

The lack of coherent coordination and the unequal treatment in the above situations are often painful; roughly half of the cases in these bilateral relations involve a discoordination between the tax and social security levies. The regime governed by the social security regulations and tax treaties is complex and often difficult to apply in practice. The relationship between social security contributions and pension levies may be skewed in a cross-border context. As a result, pensioners are often obliged to pay social security contributions in their pension state and taxes in their state of residence (sometimes even in several Member States). Pensioners may thus help finance healthcare in more than one Member State, constituting a double liability that is at odds with the freedom of movement.

The tables above also show that there are only few cases where equal treatment in the state of residence can be guaranteed.⁸⁴ The discoordination of tax and social security levies may have advantages or disadvantages. A low tax levy in Member State X will often be accompanied by low social security contributions in Member State Y. The opposite is also likely to occur however. Double taxation may take place where healthcare is financed through taxation, such as in Spain. The section 'Towards potential solutions' below will address the question of how to solve this discoordination.

4.3. Early retirement issues

In granting statutory pensions, each Member State must take into account periods of insurance in other Member States. As mentioned above, early retirement in Belgium, i.e. statutory retirement before the legal retirement age is linked to career-related conditions, for example. Following the principle of aggregation of time periods, the years of service in other Member States must be taken into account in verifying whether these career-related conditions have been met. The difficulty is that each Member State has its own national legislation to determine whether the conditions for early or statutory retirement have been met. Workers who are entitled to a statutory pension in the Netherlands or Germany, are not, by default, entitled to one in Belgium as well. If a worker opts to take her Dutch pension and stop working, this may postpone the option of her retiring in Belgium. Conversely, it will not make sense to apply for an early statutory pension in Belgium if having a foreign professional income leads to the suspension of that Belgian statutory pension for being in excess of the number of hours of work allowed after retirement. Cross-border workers would be wise to investigate whether they can retire in all Member States, and if not, to examine the impact of ceasing

⁸⁴ Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 285.

or continuing their professional activities when requesting a pension in one Member State.⁸⁵ It is difficult for cross-border workers to assess their situation, however, as they don't have a full overview of their pension status.

4.4. Discoordination of taxation and social security

Cross-border workers who are nearing the end of their careers may be confronted with a discoordination between taxation and social security, a problem that has already been examined above from the perspective of multiple-state pensioners. The section below studies the discoordination between taxation and social security for: (i) working pensioners and (ii) healthcare contributions and taxation.

4.4.1. Application 1: Social security and tax levies on working pensioners

People who are not carrying out any work activities are subject to the legislation of their state of residence.⁸⁶ Persons who receive cash benefits 'because of or as a consequence of' their activities must be regarded as people who are still employed.⁸⁷ Imagine a German resident who works in the Netherlands as a temporary worker and falls ill. He or she will receive Dutch UWV benefits and consequently remain insured in the Netherlands. Beneficiaries of benefits or pensions who decide to start working (part-time) in another Member State are subject to the rules laid down for workers. This implies that a person living in The Netherlands with a social benefit or an AOW old age pension who starts working (part-time) in Belgium or Germany is covered by social insurance in Belgium or Germany, regardless of the size of his or her job.

This working pensioner is no longer socially insured, however, but is subject to tax levies on his pension/benefit in his state of residence. This can have advantages as well as disadvantages.⁸⁸ These people are typically unaware that they have changed social systems,⁸⁹ a problem that can be solved through information provision and advice.⁹⁰ Optimisation and extension of the information provision by tax authorities and other organizations, such as the *GrensInfoPunten* (cross-border information points) and the *Grensoverschrijdend Werken en Ondernemen* team (a cross-border employment and entrepreneurship team) of the Tax Administration office in Maastricht, are generally recommended.⁹¹ At the same time, (soon to be) pensioners also have a responsibility to collect information about their own pensions. The exception provided for in Article 16 Regulation (EC) No. 883/2004 may offer another solution (see below).

⁸⁵ J. Beernaert, "Pensioenopbouw voor internationaal mobiele werknemers in de EER. Praktische tips & tricks", *OR* 2016, nr. 9, 262-274.

⁸⁶ Article 11, paragraph 3 Regulation (EC) No. 883/2004.

⁸⁷ Article 11, paragraph 2 Regulation (EC) No. 883/2004.

⁸⁸ Those involved may voluntarily take out AOW/Anw insurance for another ten years.

⁸⁹ ECJ 23 April 2013, Case C-382/13, *Franzen*, ECLI:EU:C:2015:261, RSV 2015/249, with notes by F.W.M. Keunen, *BNB* 2015/138, with notes by P. Kavelaars, *NTFR* 2015/1564, with notes by J.C.L.M. Fijen.

⁹⁰ Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 223.

⁹¹ https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/standaard_functies/privé/contact/belastingtelefoon_bel/en/team_grensoverschrijdend_werken_en_ondernemen_gwo; <https://grenzinfo.eu/nl/>.

4.4.2. Application 2: Levies on healthcare contributions and the taxation of pensioners

A large group of pensioners are entitled to medical care in their state of residence on the basis of their pensions and at the expense of another Member State: the pension state.⁹² These cross-border workers pay healthcare contributions in their pension states in accordance with the laws and regulations of these states. Most of the tax treaties, however, allocate the taxation of statutory and/or supplementary occupational pensions to the state of residence. This discoordination between tax and social security levies may have adverse or beneficial effects. Pensioners who reside in a Member State where healthcare is financed through general funds are faced with economic double taxation. Some Member States finance their healthcare through general (tax) means, through tax and social levies or through a hybrid system.⁹³ This financing can be schematically expressed as follows:⁹⁴

Pensioners	Social security contributions	Tax Levies	Hybrid levies
Illness	AT, CZ, CY, DE, EL, HR, LT, LV, PL, SI	DK, EE, IE, IT, PT, ES, UK	BE, BG, FI, FR, HU, LI, LU, MT, NL, RO, SE, CH
Long-term care	DE, EL, HR	AT, CY, DK, FI, FR, HU, LT, LV, PT, SE, ES	BE, BG, CZ, IE, LI, LU, MT, NL, PL, SI, CH

The fact that healthcare is partly or fully financed through general means in a number of Member States causes positive or negative legal conflicts in cross-border situations where a pensioner pays social security contributions in one state and is simultaneously taxed in another state. This problem can be resolved unilaterally if a state of residence offers a discount on its taxes, for example. The discount rate may equal the tax component used to fund healthcare in the state of residence. In addition, individual solutions may be reached to achieve equality in the street. By working (part-time), pensioners can shift the insurance obligation to the country of residence, where they work. Social security is subject to the country-of-work principle.

4.5. A concrete problem among unemployed Belgians in the Dutch-Belgian context

By opting for the free movement of people and working in a neighbouring country, a choice in some cases encouraged by the European policy of cross-border cooperation, unemployed residents of Belgium will find themselves disadvantaged for the rest of their lives at the end of their careers. The national legislations ensure, in principle, that the transition from the system of social benefits to the system of pensions is seamless. This smooth transition is less self-evident, however, when, due to the application of the European coordination rules, pensions are payable by a country other than the country that used to provide the social security benefits.

There is a lack of continuity in the protection of the social rights of cross-border workers who live in Belgium, have a long employment history in the Netherlands and become unemployed after the age of 65.

⁹² Sickness benefits for pensioners and members of their families. See Articles 23 to 35 of Regulation (EC) No. 883/2004,

⁹³ B. Spiegel (ed), K. Daxkobler, G. Strban & A.P. van der Mei, Analytical report 2014: The relationship between social security coordination and taxation law, FreSsco, European Commission, January 2015.

⁹⁴ Table based on the Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 228.

Example

Imagine a Belgian resident who works in the Netherlands. He is 60 years old and has been unemployed for 2 years. He receives unemployment benefits from the Belgian National Employment Office (RVA). His entitlement to unemployment benefits ends when the claimant reaches the age of 65 years, the Belgian retirement age.⁹⁵ At that time he will be expected to apply for his Belgian pension. Since he worked in the Netherlands for his entire career, however, his entitlement to a Belgian pension is very limited. He has to wait until he reaches the Dutch retirement age (of 66 years; to be increased to 67 years in 2021) to receive a pension for his work activities in the Netherlands, meaning that he will receive no Dutch pension until that time. Meanwhile, his Belgian pension is (too) low due to a (too) short career in Belgium. This person will not be entitled to any social benefits between age 65 and 66 (to be increased to 67 in 2021), meaning that he will receive no social benefits and hardly any pension.⁹⁶

Before 1 January 2015, the Belgian pension scheme for workers was virtually the only one in the EU that provided for the calculation of a (supplementary) pension for cross-border workers.⁹⁷ This is a Belgian pension benefit based on periods of foreign employment that is being phased out. In addition to the pension of the country where they worked (in the above case: The Netherlands), these cross-border workers receive a supplementary Belgian pension for the time that they had worked abroad. Until the *Programmawet* (Programme Act) of 19 December 2014, cross-border workers were entitled to the Belgian supplementary pension when they reached the Belgian retirement age. Under the current system, however, the entitlement to the Belgian supplement starts on the date when the foreign pension becomes payable. As a result of the dismantling of this pension supplement, these workers are now at risk of finding themselves in a social-legal vacuum. In the event of unemployment and (long-term) disease, they are typically not entitled to a replacement income in their work states but depend on a benefit at the expense of the Belgian social security system instead. The unemployment, disability and invalidity schemes in Belgium only cover workers up to the age of 65 years. Because Belgium's neighbours have higher retirement ages, these workers cannot claim their foreign pensions yet. While it is true that they can already claim a pension in Belgium for having reached the statutory retirement age, they are nevertheless faced with pensions that are too low due to limited careers in Belgium and the lack of a compensation scheme in the form of the pension supplement.⁹⁸

Europe only coordinates the social security systems of the Member States and does not exclude differences between these systems. Precisely these differences may lead to gaps in social protection. From a European point of view, it might be further noted that the European coordination rules dictate that pensions are payable on the basis of the rights accrued in the country of work and the minimum

⁹⁵ Article 64 of the Royal Decree (KB) of 25 November 1991 on unemployment regulations.

⁹⁶ Example based on Annual Report 2016, the Federal Ombudsman, 'De continuïteit van sociale rechten van grensarbeiders' (aanbeveling AA 16/01 aan het Parlement), pp. 27-28. Accessible via: <https://1070.makemeweb.net/sites/default/files/explorer/RG-AA-1601 - frontaliers - grensarbeiders.pdf>, p. 27-28.

⁹⁷ The complement has since only been granted under the old scheme to those who (i) had spells as a cross-border worker before 2015 and (ii) reached the age of 65 years before 1 December 2015 (or satisfied the conditions for an early retirement at that time). Those who did not meet the age condition in 2015 but did spend career years as a frontier worker before 2015 are since only granted the supplement when (iii) they have reached the foreign statutory retirement age and (iv) the foreign pension is payable.

⁹⁸ Opinion of 2018, issued at the request of the Belgian Minister of the Self-Employed: 'Versterking van de sociale bescherming van grensarbeiders', 2 March 2018. See: http://www.rsvz.be/sites/rsvz.be/files/publication/algemeen_beheerscomite_advies_201806.pdf.

age applicable there. Unemployment benefits are paid by the worker's country of residence. An uncoordinated increase in the retirement age leads to application problems in this context. If the Member States concerned have applied the European rules correctly, however, and have made appropriate use of their freedom to set their own national rules, it is much less clear who is responsible for finding a solution.

The Belgian ombudsman for pensions, the German Federal Ombudsman and the Dutch National Ombudsman are demanding a swift solution for the issue⁹⁹, which currently affects 2,900 cross-border workers and will affect 4,400 by 2020.

On 5 July 2017, a legislative proposal was put forward to strengthen the social protection of cross-border workers.¹⁰⁰ The proposal consists of changing the unemployment regulations and the law on compulsory sickness and invalidity insurance to the effect that former cross-border workers would continue to enjoy the benefits payable by the Belgian social security system until they reach the statutory retirement age of the neighbouring country where they were employed.

5. Towards potential solutions

The above-mentioned problems caused by the existence of different retirement ages between the Member States, beg the question whether, and if so, how the existing regime can be simplified and adjusted so as to do more justice to the interests of cross-border workers. A number of viable options are considered below. The idea is not to flesh out each of these options in detail or launch a proposal for the 'perfect' solution, but rather to spark a debate for the sake of progress.

5.1 Flexibilisation of the retirement age

5.1.1 A further increase of the AOW retirement age?

The further increase of the AOW retirement age follows the formula outlined in paragraph 2 of art. 7a AOW. This age is gradually being increased to 67 years in 2021¹⁰¹ and will be made contingent on life expectancy as of 2021. Based on the current criteria, the AOW retirement age will be 67 years and 3 months in 2022. This age will remain the same for 2023 as life expectancy is increasing at a slower pace. This means that cross-border workers will have to wait for their full pensions even longer.

Also note that the link between AOW retirement age and the target age for receiving supplementary pensions has been severed since 2013. Any legislation until 2013 had been based on pensions becoming effective at the age of 65. To motivate these decisions, the legislator had always used the argument of consistency with the AOW retirement age.¹⁰² This link was severed with the introduction of the *Wet verhoging AOW- en pensioenrichtleeftijd* (Increased target age for AOW and Other Pensions

⁹⁹ <http://www.ombudsmanpensioenen.be/docs/reports/2016/JV%202016%20deel%20I.pdf>.

¹⁰⁰ Wetsvoorstel tot versterking van de sociale bescherming van grensarbeiders, Parl. St., Kamer, 2016-2017, 5 juli 2017, nr. 2597/001. See also: http://www.rsvz.be/sites/rsvz.be/files/publication/algemeen_beheerscomite_advies_201806.pdf.

¹⁰¹ Dutch Social insurance bank SVB has developed a tool that residents can use to calculate their projected AOW age based on their year of birth.

¹⁰² Wet fiscale behandeling van pensioenen, *Kamerstukken II* 1997/98, 26 020, No. 3, p. 24.

Act),¹⁰³ so that the AOW retirement age and the target retirement age for supplementary pensions have increasingly been diverging since 2013.¹⁰⁴

The target age for supplementary pensions was increased to 68 years on 1 January 2018.¹⁰⁵ At the introduction of this increased pension target age, again, no attention was paid to its cross-border impacts.¹⁰⁶ Also note that the effective retirement age of workers rose by 5 months between 2016 and 2017,¹⁰⁷ putting the average retirement age for workers at 64 years and 10 months in 2017.

From a cross-border perspective, it is desirable that the AOW retirement age does not continue to rise, as this further increases the differences with the retirement ages in Belgium and Germany, with all the adverse consequences associated for cross-border workers. A recent statement said that the AOW retirement age could be increased at a slower pace, since remaining life expectancy at 65 had risen slower than previously assumed.¹⁰⁸ Figures from Statistics Netherlands (CBS) show that the Dutch who will be 65 in 2023 are expected to live for another 20.48 years. Last year, their life expectancy was still estimated at 20.74 years. Based on this new forecast of remaining life expectancy of those aged 65 in 2023, the AOW retirement age remains unchanged for 2023, meaning that it may take until 2026, instead of 2021, to reach 67 years.

5.1.2 Flexibility in AOW retirement age

The start date of the AOW pension is currently inflexible. Greater flexibility in choosing this date would allow cross-border workers with partial pensions in various Member States to enjoy their full pension on a single date. Note, however, that bringing these pensions from the different Member States forward would also lead to a proportional reduction in the amount of AOW pension. In addition, by choosing this option, i.e. to receive their full pension on the pension start date, cross-border workers would immediately qualify as multiple-state pensioners, thus preventing the transfer of the social security levy that takes place when single-state pensioners become multiple-state pensioners.

On 19 February 2016, Dutch MP Norbert Klein entered a legislative proposal for the *Wet flexibilisering ingangsdatum AOW* (Flexible AOW Commencement Date Act).¹⁰⁹ This proposal would allow its

¹⁰³ Increase of AOW retirement age and target retirement age for supplementary pensions, *Kamerstukken II 2011/12*, 33 290. Where the AOW age increase takes place in increments of one or three months, the target age for supplementary pensions increases by one full year per step. This is due to the fact that adjustment of the fiscal target age for pensions does not affect already accrued entitlements, so that a more gradual increase in the AOW retirement age is not required to achieve a gradual increase in the actual retirement age.

¹⁰⁴ See also E.A.P. Schouten, 'Ingangsdata AOW en pensioen lopen straks uiteen', *Pensioen & Praktijk* 2012/10.

¹⁰⁵ See Decision of 21 December 2016 amending certain laws and implementing decisions concerning taxes, accessible via <https://zoek.officielebekendmakingen.nl/stb-2016-549.html>.

¹⁰⁶ Despite the commitment made by former Secretary of State for Finance De Jager to explicitly include the consideration of the consequences for cross-border workers in new legislation (see the Cabinet's Opinion on the recommendations by the *Commissie Grensarbeider* (Cross-border worker Committee), 9 January 2009, 2008/2455 BCPP with reference to *Kamerstukken II 2000/01*, 26 834, No. 5).

¹⁰⁷ Based on <https://www.cbs.nl/nl-nl/nieuws/2018/25/pensioenleeftijd-werknemers-met-5-maanden-gestegen>. The actual average retirement age in Belgium was 61.3 years for men and 59.7 years for women, see https://www.nieuwsblad.be/cnt/dmf20171205_03225586.

¹⁰⁸ See <https://fd.nl/economie-politiek/1256794/actuarissen-aow-leeftijd-kan-vijf-jaar-later-stijgen-naar-67>.

¹⁰⁹ Legislative proposal by Member of Parliament Klein amending the *Algemene Ouderdomswet* (AOW - General Old Age Pensions Act) and the *Participatiewet* (Participation Act) in connection with the introduction of the option of bringing forward or postponing payment of the AOW old age pension in full or in part (*Wet flexibilisering ingangsdatum AOW - Flexible AOW Commencement Date Act*), *Kamerstukken II 2015/16*, 34 414, No. 2. It should further be noted that a

beneficiaries to take their AOW pension five years before or after the day of reaching the statutory AOW retirement age. The underlying reason for this legislative proposal was to meet the needs of people to individually shape the transition period between work and retirement. The German *Flexi-Rente* law was introduced for the same reason.¹¹⁰ The proposal was followed by a letter of amendment, arguing a limitation of the opportunity to bring forward the AOW pension from five to two years, for budgetary reasons.¹¹¹

This type of flexibility is particularly desirable from a cross-border perspective.¹¹² As the above overview of national retirement ages confirms, the Netherlands has the highest retirement age. Cross-border workers who have accrued pensions in both The Netherlands and Belgium and/or Germany will receive their Belgian or German pension earlier than their Dutch pension. This may have adverse consequences for their income.¹¹³ Increasing the flexibility of the AOW age would solve several problems experienced by cross-border workers: they would be able to avoid the shift of the social security levy (caused by the transition from single-state pensioner to multiple-state pensioner) as well as the adverse effects of a lacking pension, and it would guarantee them an adequate pension income by paying out a full pension.

This legislative proposal was rejected on 25 January 2017¹¹⁴, which is regrettable, particularly from a cross-border perspective. The legislative proposal would have offered a good solution to one of the many problems that cross-border workers face and would have achieved further anchoring of the European freedoms of movement and thus have contributed to the further realisation of the European single market. The expected positive effect of the proposal on cross-border workers will not be realised.¹¹⁵

5.1.3 The increase in retirement age for German supplementary pensions (*Betriebliche Altersvorsorge*)

On 1 January 2012, the age limit for German supplementary pensions was increased from 60 to 62 years, provided that the pension claim was granted after 31 December 2011.¹¹⁶ This increase is related to the increase of the *Regelaltersrente* retirement age from 65 to 67 years. This age limit also applies to the so-called *Riester-Rente* and *Rürup-Rente*. The increase has not been regulated by law but was

legislative proposal for the increase of the AOW pension age, an additional increase in AOW and increased flexibility regarding the start date was tabled and repealed in 2011, see *Kamerstukken II 2011/12*, 33 046, No. 2 and *Kamerstukken II 2011/12*, 33 046, No. H.

¹¹⁰ *Kamerstukken II 2015/16*, 34 414, No. 3, p. 1. See also the *Onderzoeksrapport flexibilisering AOW* (Research report on the flexibilisation of the AOW scheme):

<https://www.rijksoverheid.nl/documenten/rapporten/2017/07/14/onderzoeksrapport-flexibilisering-aow>.

¹¹¹ *Kamerstukken II 2016/17*, 34 414, No. 11.

¹¹² Similarly: Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 269.

¹¹³ As illustrated in the ITEM Cross-border Impact Assessment 2016, Dossier 7 on the Flexible AOW Commencement Date Act: https://www.maastrichtuniversity.nl/sites/default/files/nl_item_grenseffectenrapportage_2016_versie_2.1.pdf.

¹¹⁴ See <https://zoek.officielebekendmakingen.nl/dossier/34414/h-tk-20162017-55-7?resultIndex=0&sorttype=1&sortorder=4>.

¹¹⁵ See also the letter on the legislative proposal sent by ITEM to the Standing Committee on Social Affairs and Employment: <https://www.maastrichtuniversity.nl/nl/nieuws/reactie-expertisecentrum-item-op-wetsvoorstel-flexibilisering-ingangsdatum-aow>.

¹¹⁶ This age limit has been laid down in Section 1, para. 2, sub 2 *AltZertG*.

implemented on the basis of a so-called *BMF-schreiben*^{117, 118} a document in which the Ministry sets out the basic conditions that a supplementary pension provision must fulfil to receive tax facilitation, including an age limit on the pay-out phase of the pension.

5.1.4 German Flexi-Rente: bringing forward or postponing its start date and the partial pension

The German *Regelaltersrente* pension has been subject to the *Flexirentengesetz* (Flexible Pension Act) since 25 November 2016.¹¹⁹ The purpose of this new legislation was to make the transition period from work to retirement more flexible and to make working after retirement more attractive. Firstly, workers can earn a more flexible income before reaching retirement age, i.e. combine part-time retirement with continuing to work. A prerequisite for bringing forward the *Regelaltersrente* is that the required waiting period has finished. Note, however, that the pension amount is reduced by approximately 3.6% for every year of earlier pay-out. This reduction can be easily compensated through supplementary premium payments. This scheme has been effective since 1 July 2017. Previously, active workers could, in principle, earn EUR 450 per month in additional income without incurring any pension reductions. Workers who earned more faced a reduction of their pension benefits by two-thirds, by half or by one third. Since the introduction of the *Flexirentengesetz*, however, these workers can earn EUR 6,300 per year without any reduction in pension benefits.¹²⁰ Any additional income that exceeds EUR 6,300 is deducted from the pension and is even capped.¹²¹

Example

X receives an *Altersrente* of EUR 950. In addition, she receives EUR 1,510 monthly from employment, i.e. EUR 18,120 per year. After deduction of the threshold of EUR 6,300, an excess amount of EUR 11,820 per year remains, equalling EUR 985 per month (one-twelfth). The pension benefit is reduced by forty percent of this amount, i.e. EUR 394 monthly, which, in principle, leads to a monthly pension of EUR 556, aside from the cap placed on the additional earnings.

¹¹⁷ A type of implementation-related communication from the German Ministry of Finance.

¹¹⁸ BMF Schreiben of 31 March 2011 (Az. IV C 3 - S 2222/09/10041; IV C 5 - S 2333/07/0003; Abruf-Nr. 114139), point 249: *'Als Untergrenze für betriebliche Altersversorgungsleistungen bei altersbedingtem Ausscheiden aus dem Erwerbsleben gilt im Regelfall das 60. Lebensjahr. Für Versorgungszusagen, die nach dem 31. Dezember 2011 erteilt werden, tritt an die Stelle des 60. Lebensjahres regelmäßig das 62. Lebensjahr.'*

(*'The minimum age for corporate old-age pension provisions for age-related retirement from business life is typically 60 years. Pension entitlements granted after 31 December 2011 will have a standard retirement age of 62 years instead of 60 years.'*)

¹¹⁹ https://www.deutsche-rentenversicherung.de/Allgemein/de/Navigation/5_Services/01_kontakt_und_beratung/02_beratung/03_haeufige_fragen/12_flexirente_node.html. For a brief description of flexibilisation, see also: https://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/1_Lebenslagen/05_Kurz_vor_und_in_der_Rente/01_Kurz_vor_der_Rente/02_arten_und_regeln_der_altersrente.html.

¹²⁰ Note that this amount of EUR 6,300 applies to all German federal states, both the 'old' and the 'new'.

¹²¹ This upper limit - the so-called *Hinzuverdienstdeckel* - to additional earnings is based on the income earned in the three years prior to reaching the retirement age, on the one hand, and on the share of the expected pension benefits on the other hand. If this amount in additional earnings exceeds the maximum limit, the excess is entirely deducted from the partial pension benefit. Note that the *Deutsche Rentenversicherung* has pointed out that starting one's statutory pension early or late while continuing to work may have consequences for any additional German pensions. Exceeding the *Hinzuverdienstdeckel* in conjunction with enjoying a part-time pension may lead to a reduction in the supplementary pension in some cases. See https://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/2_Rente_Reha/01_rente/04_in_der_rente/02_hinzuverdienstgrenzen/00_hinzuverdienstgrenzen.html.

In addition, pensioners can continue to work beyond the retirement age, which will increase their *Regelaltersrente* if requested. This scheme became effective on 1 January 2017, after which pensioners could continue to work after retirement for an unlimited period of time. The scheme has another advantage: there is a supplement for postponing the payment of pension benefits or a higher pension for pensioners who continue to work while on a pension and who keep making pension contributions. The pension benefits increase by 0.5% for every month of (continued) work after reaching the retirement age and not receiving any pension yet. Working on for a period of 2 years after reaching the age of retirement may increase ultimate pension benefits by approximately 17%: 12% in supplements and 5% in additional contributions.¹²²

5.2 Multiple-state pensioners: towards a better coordination of taxation and social security

The parallel application of tax treaties and Regulation (EC) No. 883/2004 leads to complex situations and differences in net pension incomes in the pensioner's state of residence. The question is how to achieve better coherence of the tax and social security levies on pensions. A possible solution is the abolition of the special provisions for pensioners in the regulation, exclusive application of the main rule on the taxation of pensions (art. 18 OECD Model Convention) and the allocation of the insurance obligation to the state of residence (Art. 11, paragraph 3, item e Regulation (EC) No. 883/2004). As a result, both taxes and social security contributions would be subject to levying in the state of residence.¹²³ This would lead to equality in the street, as guaranteed under the TFEU.¹²⁴ The following table shows the pros and cons of a state-of-residence levy.

Pros of a state-of-residence levy	Cons of a state-of-residence levy
Equality among neighbours in the street	Politically non-feasible and unrealistic; opposition from Member States: Member States caring for pensioners who have not contributed; no/hardly any contribution to the financing of healthcare; burden on active labour force
Coordination of social security and taxation	The Netherlands is seeking to impose a source state levy on tax-facilitated pensions accrued, including regular pension payments and payments of the redemption value of pensions and regardless of the fiscal treatment of these pensions in the pensioner's (new) state of residence. ¹²⁵

¹²² Based on https://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/1_Lebenslagen/05_Kurz_vor_und_in_der_Rente/01_Kurz_vor_der_Rente/02_arten_und_regeln_der_altersrente.html.

¹²³ For supporting arguments, see G.J.C. Essers and M.J.G.A.M. Weerepas, 'Grensarbeid: nog steeds veel werk aan de winkel', *Vp-bulletin* 2017/45, p. 12.

¹²⁴ The state of residence is also in a better position to take account of personal circumstances, such as deductions or tax relief on mortgage interest, see G.J.C. Essers and M.J.G.A.M. Weerepas, 'Grensoverschrijdende pensioenen: gebrek aan samenhang tussen fiscale en sociale heffingen', *TPV* 2017/35, p. 12-13.

¹²⁵ See Notitie Fiscaal Verdragsbeleid 2011, p. 54-55. Given the continuing internationalisation of the labour market and the ensuing increase in the number of Dutch tax subjects who will be enjoying their accrued pensions abroad after retirement, it seems unlikely that the Netherlands will abandon this position, partly in view of the importance attached by the Dutch tax authorities to the protective pension assessments. In addition, states that facilitated the accrual of pensions through fiscal means are increasingly receiving international recognition of their desire to levy these pensions.

Social life in the state of residence and use of the public services	Exclusive levying in the state of residence may lead to foreign pension income not being declared. ¹²⁶ This may be countered by the exchange of information linked with compliance-based systems. ¹²⁷
No levy shift when working in the state of residence	
Benefits for long-term care in the state of residence	
Reduction of the administrative burden of pensioners and in the Member State of origin (no double taxation); no legal uncertainty about the net pension income as a result of contributions paid in one Member State and taxes paid in another Member State	
Simplification of Regulation (EC) No. 883/2004	
The state of residence is in a better position to take account of financial position and the personal circumstances when levying, possibly leading to forms of tax relief, such as deductions ¹²⁸	
No need to consider the tax authorities in the other state	

A less far-reaching solution may be chosen, however, to adapt and improve the current regime. One solution could be to use the duration of the insurance as a starting point for designating the competent (pension) state.

In addition, cross-border workers might opt for tailor-made solutions. A creative individual construction could be to accept a (small partial) pension and/or a small employment contract. Pensioners increasingly accept secondary jobs to supplement their (small) pensions, as labour income and pension benefits can be cumulated to a certain extent. If Dutch or Belgian pensioners accept a job across the border, however, this will affect their social security positions. Since Regulation (EC) No. 883/2004 designates the social security legislation of the work state as the applicable legislation, those concerned shall exclusively be subject to the legislation of the work state. Single-state pensioners can

¹²⁶ See Commentary on the OECD Model Convention 2010, art. 18, par. 21.

¹²⁷ That cross-border exchange of information on the tax treatment of foreign pensions may be difficult was illustrated by the repeal of income tax exemptions by the Dutch tax authorities in December 2017, see the relevant Letter to Parliament <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/02/23/kamerbrief-afspraak-tussen-nederland-en-belgie-over-pensioenproblematiek>. See also the ITEM news release <https://www.maastrichtuniversity.nl/nl/nieuws/item-einde-aan-dubbele-belasting-van-pensioenen-grensarbeiders>.

¹²⁸Cf. Commentary on the OECD model convention, art. 18, par. 17. See also G.J.C. Essers and M.J.G.A.M. Weerepas, 'Grensoverschrijdende pensioenen: gebrek aan samenhang tussen fiscale en sociale heffingen', *TPV* 2017/35, p. 12-13.

achieve a social security switch by taking a job in their country of residence. This may, however, affect the rules on health insurance, for example, leading either to advantages or disadvantages.

Pro-rata levying of social security and tax contributions

A possible alternative is a proportionate (pro-rata) levy¹²⁹, whereby the levy is evenly divided between the source state and the state of residence. The allocation rules or social security levies to which pensioners are subject as per Regulation (EC) No. 883/2004 must nevertheless be taken into account. The principle of exclusivity in Regulation (EC) No. 883/2004 dictates that only one Member State can levy social security contributions/charges. The allocation method, however, divides pensioners in one and the same family between their state of residence and the source state.

As Essers and Weerepas rightly state, the proportional and equal sharing of the tax levy is no solution if not linked to the exclusive levying of social security contributions.¹³⁰ On the one hand, this would solve the discoordination between the tax and social security levy as illustrated above with tables and examples. On the other hand, it would imply the exclusive transfer of the tax levy to the state of residence. This option does not seem very realistic, though, in light of the international efforts to impose a source-state levy on fiscally facilitated pensions during treaty negotiations.¹³¹ Partly due to the increasing flow of cross-border labour, the source state levy seems to be gaining importance for Member States. If premium contributions were charged to the taxable income in the past, the state that offers these amenities wishes to see a 'return' through taxation of the pension benefit.¹³²

Note that the Secretary of State for the Treasury and Finance stated during the parliamentary proceedings regarding the approval of the tax treaty with Germany that the Dutch government has for some time been advocating maximum avoidance of discoordination between tax and social security levies.¹³³ The government addressed this issue in detail during the parliamentary approval of the 2001 tax treaty between the Netherlands and Belgium.¹³⁴ According to the Secretary of State, the most viable variant would be to link the tax and social security levies in a bilateral tax treaty.¹³⁵ Note that it was not explained why primacy should lie with the levying of social security contributions, with fiscal levying following suit. Neither Belgium - during the conclusion of the tax treaty in 2001 - nor Germany - during negotiations on the tax treaty of 2012 - were prepared to link the taxation of cross-border workers to the country where they are subject to social security as per Regulation (EEC) No. 1408/71 or Regulation (EC) No. 883/2004. The negotiating parties dismissed the variant that would use art. 17 of Regulation No. 1408/71 or art. 16 of Regulation 883/2004 to reach a categorical agreement linking the social security levy to the tax levy, claiming that it was not desirable and the articles were not intended for this purpose.¹³⁶

¹²⁹ For alternatives regarding a shared levy, see: Commentary on the OECD model convention, art. 18, par. 15.

¹³⁰ G.J.C. Essers and M.J.G.A.M. Weerepas, 'Grensoverschrijdende pensioenen: gebrek aan samenhang tussen fiscale en sociale heffingen', *TPV* 2017/35, p. 13.

¹³¹ See for example Notitie Fiscaal Verdragsbeleid 2011, p. 54-55.

¹³² Netherlands-Belgium treaty of 2001, Netherlands-Germany treaty of 2012.

¹³³ *Kamerstukken II* 2013/14, 33 615, No. 8 (Note in response to the report).

¹³⁴ *Kamerstukken II* 2013/14, 33 615, No. 8 (Note in response to the report).

¹³⁵ *Kamerstukken II* 2013/14, 33 615, No. 8 (Note in response to the report).

¹³⁶ *Kamerstukken II* 1999/00, 26 834, No. 3, p. 57.

5.3 Limiting the authority of the pension state to levy social security contributions or the authority of the state of residence to levy tax

As illustrated by the examples above, multiple-state pensioners deal with two Member States, i.e. the pension state and the state of residence. In some cases, tax is levied in the state of residence and social security contributions in the pension state or vice versa. Pensioners may thus contribute to the financing of healthcare in more than one Member State, resulting in a double disadvantage. The conflict rules in the bilateral tax treaties are essentially not in line with the conflict rules of Regulation (EC) No. 883/2004, and the authority to tax is not always granted to one Member State. The equal treatment of (retired) cross-border workers is not guaranteed due to the double obligation to contribute.

As Verschueren states, it is possible, at least theoretically, to limit the authority of the pension state to levy social security contributions or the authority of the state of residence to levy tax.¹³⁷ As a result, illustrated above by a number of examples, the social security levy would no longer be transferred from the moment pensioners qualify as double-pension pensioners. Germany has the authority to tax a Dutch single-state pensioner with only a German pension of more than €15,000 and levy social security contributions. While this does not constitute equal treatment in the state of residence, it does in the pension state. From the moment this pensioner starts receiving a Dutch pension as well, thus qualifying as a multiple-state pensioner, the tax levy rights are shared and the authority to levy social security contributions is allocated to the Netherlands. The authority to levy social security contributions thus transfers from Germany to the Netherlands. In this case, there is no equal treatment in the state of residence nor in the pension state.

As Verschueren rightly notes, a restriction of the pension state's authority to levy social security contributions is not the obvious choice, as the pension state bears the healthcare costs; it would not make sense to deprive this Member State of its authority to collect premiums or levy contributions.¹³⁸ This would only make sense if the obligation to bear the healthcare costs were transferred to the state of residence, a transfer that does not appear to be a realistic or politically viable option.

In addition, the authority of a state of residence to tax might be restricted. In this context, Verschueren proposes the introduction of a provision in Regulation (EC) No. 883/2004 stipulating that any tax levies that pensioners are charged in their state of residence are not payable insofar as they concern the financing of healthcare benefits.¹³⁹ For example, a pensioner with a pension from state A lives in Member State B, which largely finances its healthcare system through taxation and spends 7% of its tax revenues on healthcare benefits. This person is subject to taxation in Member State B and has a right to healthcare benefits there, which are borne by a Member State A, where he or she pays healthcare contributions. This pensioner could claim a reduction in income tax in Member State B, which, after all, does not have to bear the costs of the care provided. Verschueren claims that this method, while simple, may raise questions as to which percentage should be set. Although this option would contribute to the equal treatment of cross-border workers, it raises some questions as to technical aspects of implementation and the administrative burden for the implementing bodies.

¹³⁷ H. Verschueren et al., *Werken over de grens België-Nederland*, Antwerpen: Daalder 2011, p. 238.

¹³⁸ H. Verschueren et al., *Werken over de grens België-Nederland*, Antwerpen: Daalder 2011, p. 238.

¹³⁹ H. Verschueren et al., *Werken over de grens België-Nederland*, Antwerpen: Daalder 2011, p. 238.

Member States with a healthcare system financed from general taxation may resist this option however. These Member States will gain lower tax revenues and may invoke the division of powers to oppose this development. Exchanging information on the tax treatment of pensions across borders is not easy.

5.4. Agreement under Article 16 Regulation (EC) No. 883/2004

Article 16 Regulation (EC) No. 883/2004 allows for derogation from the applicable allocation rules in the interest of cross-border workers. Pensioners, for instance, who live in The Netherlands and work in Belgium or Germany for one day a week are typically insured in the work state. While the implementation bodies of the relevant Member States can agree that Dutch social insurance is applicable, workers nor their employers tend to make use of this option. If the Dutch legislation is designated as the applicable law, a Belgian or German employer must follow Dutch social security rules. This is administratively complex for employers as Dutch legislation, e.g. the continued wage payment obligation, is often not known abroad. Private insurance is therefore sometimes preferred over the obligation to continue to pay wages.¹⁴⁰

5.5. Preventative Cross-Border Impact Assessment as part of the legislative process

Besides the fact that preventive cross-border impact assessments should be part of new (national or European) legislation, these assessments should be multidisciplinary in nature.¹⁴¹ A multidisciplinary approach, in particular, would reveal the compartmentalised policies and the discoordination between taxation and social security. These results could help improve the coherence between bilateral or other tax treaties and Regulation (EC) No. 883/2004. Cross-border impact assessments should therefore be welcomed for their ability to offer maximum insight into the concrete consequences of legislation and regulations at an early stage. A preventive assessment of the 'Flexibilisation of the AOW Commencement Date Act' could have shown the potentially positive effects of the bill for cross-border workers who accrued a Dutch AOW pension as well as a foreign statutory pension.¹⁴²

6. Conclusion

6.1 Cross-border impact

The retirement age differs between between Member States. The Dutch AOW old-age pension has a later start date than the statutory old-age pensions in Belgium and Germany. As a consequence, workers who have accrued a Dutch AOW old age pension as well as a foreign statutory pension, e.g. migrant workers and cross-border workers, must wait for their AOW pension for a period of time when their foreign statutory pension starts. This may affect their income positions, while the wide variety in retirement ages puts pressure on the overall adequacy of their pensions. The rejected legislative proposal to make the AOW start date more flexible could have had a positive impact. Flexibilisation

¹⁴⁰ Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, pp. 223-224.

¹⁴¹ See also recommendation 10, Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 314.

¹⁴² See for examples ITEM Cross-border Impact Assessment 2016, Dossier 7 Flexibilisation of the AOW Commencement Date Act: https://www.maastrichtuniversity.nl/sites/default/files/nl_item_grenseffectenrapportage_2016_versie_2.1.pdf.

would have offered cross-border workers the option of aligning the start date of their Dutch AOW pension with the start date of their foreign statutory pension. It is regrettable that the bill for a flexible retirement age was not adopted. It would have enabled cross-border workers to set a single start date for the statutory pension benefits that they accrued. The Dutch situation offers another solution, however: to bring forward the Dutch supplementary pension's retirement age. This would, on the other hand, deplete the pension savings of those involved and lead to a steep drop in the monthly pension benefit payable until death.

One issue that is very problematic from the EU internal market perspective is the obligation to pay double contributions due to the discoordination between taxation and social security. In some cases, tax is levied in the state of residence and social security contributions in the pension state or vice versa. Pensioners may thus contribute to the financing of healthcare in more than one Member State, experiencing a disadvantage in the form of economic double taxation. The rules of conflict in the bilateral tax treaties are essentially not in line with the conflict rules of Regulation (EC) No. 883/2004, and the authority to tax is not always granted to one Member State. The equal treatment of (retired) cross-border workers is not guaranteed due to the obligation to pay double contributions. This problem can be solved by limiting the tax authority of the country of residence. Regulation (EC) No. 883/2004 has room for the introduction of a provision stipulating that any tax levies that pensioners are charged in their state of residence levies are not payable insofar as they concern the financing of healthcare benefits.

And, last but not least, good pension information and a good cross-border pension information system can offer cross-border workers insight into the accrued pensions in various countries. A European pension register (or, on a smaller scale, a system between the Netherlands, Belgium and Germany) could give cross-border workers a clear and accurate overview of the cross-border pensions that they have accrued, particularly offering insight into the different retirement ages. Such a system would be a positive impulse for the labour mobility of workers.

6.2 Future avenues

This Cross-border impact assessment can be further developed and supplemented by, among other things, more and better cross-border data and figures. We believe that it is recommendable to carry out a coherent cross-border impact assessment during the parliamentary treatment of new legislation and to include the effects on cross-border workers when creating new pension legislation. The findings from the cross-border impact assessment should be included in a separate paragraph in the Explanatory Memorandum, taking into account the various factors that may affect the income position of cross-border workers at retirement (e.g. marital status, working longer in Belgium and/or Germany, the accrual of a supplementary pension). What analyses of border effects have taken place have been inconsistent as to their execution, i.e. have used different research methods. The above shows that the impact of new legislation on cross-border workers and border regions in general is still not receiving the attention it deserves and that border effects are still being underestimated by national legislators.¹⁴³

Commissie grenswerkers, *Grenswerkers in Europa: een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap, p. 311.

¹⁴³ It is a positive sign, however, that the year 2017 saw the publication of two studies on the position of cross-border workers:

- Report of the Commissie grenswerkers, *Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken*, Geschriften van de Vereniging voor Belastingwetenschap no. 257, Vereniging voor Belastingwetenschap 2017.

- H. Niesten, *Belastingvoordelen van de grensoverschrijdende economisch actieve EU-persoon* (diss. Maastricht and Hasselt), 2017.



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