

Cross-Border Impact Assessment 2019

Dossier 2: Cross-border effects of the Dutch Act on the Legal Status of Public Servants (WNRA)



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

Maastricht University

Cross-Border Impact Assessment 2019

Dossier 2: The Social Security and Pension Situations of Cross-Border Public Servants
after the Introduction of the Public Servants (Standardization of Legal Status) Act (WNRA)

Prof.dr. Marjon Weerepas
Charlotte Conjaerts

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.

ITEM is an initiative of Maastricht University (UM), the Dutch Centre of Expertise on Demographic Changes (NEIMED), Zuyd University of Applied Sciences, the City of Maastricht, the Euregio Meuse-Rhine (EMR), and the Dutch Province of Limburg.



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1. Introduction¹

The social security situation of public servants who work in the Netherlands, live across the border in, for example, Belgium or Germany and work there as well – or vice versa – may change as a result of the implementation of the Public Servants (Standardization of Legal Status) Act (*Wet normalisering rechtspositie ambtenaren* – hereafter: WNRA).² This Act is expected to enter into force on 1 January 2020 and will change the public-law appointments of more than half a million public servants into private-law employment contracts.³ In addition, new groups of public servants will be created, including employees of the Dutch Employee Insurance Agency (hereafter: UWV) and the Social Insurance Bank (SVB).

The most recent figures show that a total of 97,000 Dutch, Belgian and German nationals regularly commute across the border for work activities. Nearly 10,000 employees from the Netherlands work in Belgium or Germany every day. In addition, there are more than 16,000 Dutch nationals who live in Germany and work in the Netherlands, and Belgium hosts more than 22,000 Dutch nationals who work in the Netherlands.⁴ The number of public servants who find themselves in such cross-border situations is unknown,⁵ nor do we know how many of these cross-border public servants also work in their country of residence or in yet another State. The Maastricht UMC+ alone, for instance, employs around 800 people who live in Belgium or Germany. The question is how many of them also work in their respective countries of residence.

Statistics Netherlands (CBS) has only figures on the total number of Dutch nationals working or living across the border. In collecting these data, it makes no distinction between public servants and ‘ordinary’ employees. An initial recommendation could be that Statistics Netherlands should provide more insight into how many of the cross-border workers have a public servant status.

Alongside the WNRA, another law will enter into force for the staff in the education sector, amending certain laws related to the standardisation of the legal position of public servants in education. This law has been introduced because it is no longer considered desirable to distinguish between private education and public education.⁶

1.1. Historical background to the adoption of the WNRA

The WNRA is expected to enter into force on 1 January 2020. The adoption of this law was preceded by a long history, briefly summarised below. It all began with a number of major strikes by government-employed railway staff in 1903. This led to a loud call in politics and society for a ban on strikes in public and semi-public services, restricting the right to strike for government employees. In the following years, various laws were adopted to better protect the position of public servants, for example by harmonising salary scales and introducing an unemployment scheme.

¹ The subject is currently very much on the move. This report presents the state of affairs as at 31 August 2019.

² Stb. 2017, 123.

³ ‘Hoeveel ambtenaren gaan onder de WRNA vallen?’, Ministry of the Interior and Kingdom Relations.

⁴ ‘Arbeidsmarkt zonder grenzen’, Statistics Netherlands (CBS), 21 July 2015.

⁵ See also question 1, Questions by MPs Krol and Van Brenk (both members of 50PLUS) to the Ministers of the Interior and Kingdom Relations and of Social Affairs and Employment about *the cross-border effects of the Public Servants (Standardization of Legal Status) Act (WNRA)* (submitted on 9 July 2019).

⁶ Kamerstukken II 2018/19, 35 089, No. 3. The Act was adopted by the Lower House of Parliament in June 2019. See Kamerstukken II 2018/19, Stemmingen Normalisering rechtspositie ambtenaren in het onderwijs, p. 94-21-1.

Over the years, there has been regular debate about the position of public servants. It was argued that governments, as guardians of the public interest, should not negotiate on equal footing with their employees, as this would jeopardise the public interest. As a result, a committee ruled that the principle of unilateral appointment should be upheld.⁷ Nevertheless, in the course of the 1960s, the position of the trade unions became noticeably stronger. In 1980, the ban on strikes was finally lifted as the European Social Charter became applicable in the Netherlands. Nine years later, the so-called 'requirement to agree' ('*overeenstemmingsvereiste*') was introduced,⁸ meaning that the government could no longer unilaterally change its unilateral employment contracts. Subsequently, various sectors of the public administration were given more of a say in the terms and conditions of employment and became subject to the Works Councils Act (*Wet op de ondernemingsraden*). Also, the public-law pension fund for public servants, *Algemeen Burgerlijk Pensioenfonds* (General Public Pension Fund), was transformed into a private-law sectoral pension fund. All in all, public servants now had a voice, and the differences in legal status between private-sector employees and public servants were gradually reduced.⁹

The year 1997 marked the first step towards the abolition of the public status of civil servants. The Zijlstra motion enabled research into the necessary conditions for abandoning this status.¹⁰ While the conclusion was that it was too early for abolition, further "normalisation" was encouraged.¹¹ Following this, public servants started to fall under the statutory employee insurances, and legal terms such as the principle of 'being a good employer' ('*goed werkgeverschap*') were included in the Central and Local Government Personnel Act 2017 (*Ambtenarenwet - AW*).¹² At the same time, the special insurances for public servants started to disappear. The gap between the government's legal system and that of the private sector was narrowing.

Today, the call for convergence of the private and the public sectors is so strong that, despite years of political wrangling, the WNRA has eventually made it through the Dutch Parliament.¹³ In 2010, the WNRA bill was finally submitted. It was adopted in the Senate on 8 November 2016¹⁴ and published in the Dutch Bulletin of Acts and Decrees (*Staatsblad*) in March 2017.¹⁵ The law's entry into force is scheduled for 1 January 2020.

The law's implementation will change important aspects for the parties concerned, including social security in cross-border situations, collective labour agreements, applicable dismissal law, and tax law on pensions. The status of public servant is disappearing in its old form, while its remaining content has been updated in the 2017 Central and Local Government Personnel Act (*Ambtenarenwet 2017*).

Important are the effects of the WNRA on, among other things, the international social security position of cross-border public servants. Social security can be divided into (compulsory) contributions on the one hand and benefits on the other hand. Regarding benefits, for example, one question is whether the Dutch administration, as an employer, forced to insure its employees residing in Belgium

⁷ Report of the advisory State Commission regarding the status of public servants, The Hague, 1958, p. 96. See Kamerstukken II 2010/11, 32 550, No. 6, p. 2.

⁸ The consultation between parties is subject to the requirement to agree.

⁹ Kamerstukken II 2010/11, 32 550, No. 6, pp. 2-4.

¹⁰ Kamerstukken II 1996/97, 25 282, No. 8.

¹¹ Kamerstukken II 2010/11, 32 550, No. 3, p. 4 ff.

¹² Kamerstukken II 2010/11, 32 550, No. 3, p. 3 ff.

¹³ Website of the Ministry of the Interior and Kingdom Relations, consulted on 29 July 2019.

¹⁴ Kamerstukken I 2016/17, 32 550, No. 6.

¹⁵ Stb. 2017, 123.

or Germany, is obliged to apply the Continued Payment of Wages in the Event of Sickness Act (*Wet loondoorbetaling bij ziekte - Wulbz*), the supplementary collective labour agreement, or the German, respectively Belgian, rules on the continued payment of wages in the event of sickness (including sickness benefits). Which national or EU legal basis underlies this choice?¹⁶ This report does not cover social security benefits but focuses on the topic of contributions and, particularly, on the right to levy taxes on pensions.

1.2. State of affairs

In 2018, the Dutch Minister of the Interior and Kingdom Relations requested an (ex ante) Implementation Review for the WNRA and the WNRA Adjustment Act. In this review the UWV addressed the issue of the social security position of former public servants¹⁷ in cross-border situations, which may be subject to change. In its letter, the UWV confirmed that the introduction of the WNRA and the change of status from public servant to employee or vice versa may change the applicable social security legislation for those involved. The introduction of the new legislation may thus make another Member State responsible for the levying of contributions and the provision of social security benefits.

EU regulations stipulate that cross-border workers can only be compulsory subject to the social security system of one country. While 'ordinary' employees are, as a rule, subject to the country-of-employment principle, for public servants, by way of exception, a priority rule applies that usually allots the provision of social security to the country where the public service is established. In effect, the new law and the legislative proposal may have a significant impact on education staff in the Netherlands working across borders, particularly those working in two or more countries.

The UWV recognises that the introduction of the WNRA holds such risks, especially for situations where for the implementation of social security the competent authorities have failed to arrange a timely exchange of data. The letter subsequently clearly stipulates that employees in public education, for example, will lose their status as public servants and become employees. This may include all of the consequences imminent as a result of the application of EU Regulation No. 883/2004: After all, public servants usually fall under the applicable legislation of the Member State to which the public service that employs them is subject. Employees, instead, are generally subject to the legislation of the Member State in which they work. The reason why the UWV addresses this is that social security contributions must be paid to the competent State and the competent authority. As a result of the new WNRA-law, the applicable legislation regarding the social security obligation may change, which means the competent authority may change.

The UWV has announced that it is insufficiently prepared for this change, in that it lacks the information that it needs to determine the social security position of employees. The letter, however, does not discuss what this change will mean in practice for former public servants.¹⁸ We believe that

¹⁶ Questions by MPs Krol and Van Brenk (both members of 50PLUS) to the Ministers of the Interior and Kingdom Relations and of Social Affairs and Employment about *the cross-border effects of the Public Servants (Standardization of Legal Status) Act (WNRA)* (submitted on 9 July 2019), question 3.

¹⁷ For the purposes of this report, the term 'former public servant(s)' refers to those who will be regarded as public servants until 1 January 2020 and as employees from that date onward due to the introduction of the WNRA.

¹⁸ Letter from the UWV of 20 December 2018 concerning the Implementation Review, including advice on the workload and costs of implementing the (Adaptation Act to the) Public Servants (Standardization of Legal Status) Act (WNRA) on the harmonisation of the legal position of public servants, No. SBK/98559/IZ, UWV. See also the Letter of 8 July 2019, *Nadere*

the allocation of the social insurance obligation may shift, particularly for those who carry out activities in two or more Member States.

In the subsequent letter from the Minister of Social Affairs and Employment to the Chairman of the Executive Board of the UWV, the Minister acknowledges that the consequences of the introduction of the WNRA in relation to the European Regulations needs to be further elaborated and that this would be discussed in more detail shortly. The relevant authorities have received the assurance that they would be kept up to date.¹⁹ It is however unclear whether this pledge included the foreign authorities, such as the Belgian National Social Security Office (*Rijksdienst voor Sociale Zekerheid*), the competent body for the application of Regulation No. 883/2004 in Belgium.

A letter from the Chair of the Standing Committee on Social Affairs and Employment to the Minister of Social Affairs and Employment emphasised once again how unclear the current situation is. In this letter, the Chair acknowledges the importance of obtaining clarity about the social and fiscal consequences for cross-border public servants following the implementation of the WNRA, particularly regarding the social security shift and all of its consequences for public servants and employers. An earlier request of the Committee for Cross-Border Workers to install a committee of experts in order to find solutions for the problems of cross-border social security coordination had not yet been honoured, and the Chair again invited the Minister to meet this request.²⁰

In July 2019, a number of questions were asked in Parliament about the cross-border effects of the WNRA,²¹ which were still awaiting a response at the time of finalising this Dossier.

2. Objectives & Methods

2.1. Effects today or in the future: an ex-ante assessment

This Cross-Border Impact Assessment dossier is of an *ex-ante* nature, given that the new legislation will become effective on 1 January 2020. We will analyse the probable impact of this future legislation on the social security position and pension status of public servants in cross-border situations. Both may be subject to change and may become more complicated due to the introduction of the new legislation. A number of public servants will lose their status as appointed public servants and, in terms of their social security status, become employees with bilateral employment contracts. As a result, in cross-border situations it may happen that Dutch social security legislation may no longer be applicable to these persons having lost their public servant status, where – if they work in two or more Member States – they become compulsory subject to the legislation of another Member State. At the same time, due to the new law there are also several groups for whom the employment status will change

vragen over de herziening EU-verordening coördinatie sociale zekerheidsstelsels (Further questions about the revision of the EU regulation on the coordination of social security systems), No. 2019-0000099383, p. 3.

¹⁹ Letter of 19 February 2019 from the Ministry of the Interior and Kingdom Relations about the Implementation Review and advice on the workload and costs of implementing the (Adaptation Act to the) Public Servants (Standardization of Legal Status) Act (WNRA) on the harmonisation of the legal position of public servants, No. 2019-0000074874.

²⁰ Letter of 22 May 2019, *Nadere vragen over de EU-verordeningen herziening coördinatie socialezekerheidsstelsels* (Further questions about the revision of the EU regulations regarding the coordination of social security systems) (COM(2016) 815), No. 163336.04u.

²¹ Questions by MPs Krol and Van Brenk (both members of 50PLUS) to the Ministers of the Interior and Kingdom Relations and of Social Affairs and Employment about *the cross-border effects of the Public Servants (Standardization of Legal Status) Act (WNRA)* (submitted 9 July 2019).

from that of employee into an appointment as public servant. These persons may indeed also face changes in their social insurance obligation if they work across borders.

Using a number of calculations, this report sheds light on the financial consequences associated with a change in the obligation to pay social security contributions. It also outlines the current treaty rules on the allocation of taxing rights with respect to pensions.

2.2. Limitations

In this dossier, we have opted for a broader definition of the term 'border region': the public servants in question can work and/or reside in Belgium or Germany, without limiting this to one or more border regions. Of course, for practical reasons, it would be more obvious for cross-border workers to work and/or live close to the Dutch border. Nevertheless, the report is not limited to, for example, the border areas of the Euroregions but includes the territory of all of the Member States concerned. In addition, the non-traditional cross-border workers must be taken into account,²² such as homeworkers with an (online) job across the border. These workers are not bound to any specifically defined border region.

The next limitation concerns the relevant group of workers for this dossier. As mentioned above, it is not clear exactly how many public servants will be affected by the new legislation. To provide more clarity and a more comprehensive description of the situations of the public servants concerned, a number of cases are outlined below. These cases are modelled on real-life situations.²³ These situations will be explained using relevant legislation, so as to determine the social security and pension situations of the workers concerned following the entry into force of the WNRA and to show the financial consequences of any changes in the allocation of the social insurance obligation.

The third limitation is relevant for mapping the consequences for the employers of the above-mentioned workers: the exact (financial) consequences of the amendment of the Act are unclear also for employers, as are the ensuing adjustments to, for example, payroll processing. For employers, this Dossier will use the same approach to explain the effects in each situation.

The final limitation of this Dossier relates to the subject studied: the consequences of the new Act for the social security and pension situations of former public servants working in a cross-border context. The introduction of the WNRA will doubtlessly affect more aspects of these workers' lives, including, for example, the areas of tax law, contract law, dismissal and (collective) employment conditions. However, this Dossier mainly focuses on the consequences of the Act for the right to levy social security contributions and the competence over pension taxation. It does not cover any of the other aspects addressed above.

2.3. Research Themes, Principles, Benchmarks and Dossier Indicators

2.3.1. The Research Themes

The ITEM Cross-Border Impact Assessments limit themselves to the following three themes: European integration, sustainable development/socio-economic development and Euregional cohesion.

²² A traditional cross-border worker can be defined as a person who lives on one side of the border and works on the other side and who returns to his state of residence daily or at least once a week.

²³ For more information, see: www.grensinfo.nl.

Theme 1, European integration, covers the cross-border effects from the perspectives of citizens, associations and businesses, relating these effects to the objectives and principles of European integration. Concretely, this Dossier sets out the cross-border effects of the implementation of the new legislation from the perspective of EU citizens – i.e. the relevant cross-border workers and their employers – on a case-by-case basis. To the extent outlined above, under this theme the report mainly addresses the consequences of the new legislation for the social security contributions and its effects on pensions. The report examines whether the application of the WNRA harms cross-border workers who operate in more than one Member State, both economically and/or in terms of residence, compared to the situation before the introduction of the Act. Public servants who work from home (on a part-time basis) and/or have a secondary job in one or more Member States are an important factor in this report. The next step is to analyse whether European integration is hindered by the new rules.

Theme 2, sustainable development, calls for a description of how the implementation of the WNRA affects sustainable and socio-economic developments across borders. This requires quantitative data. Unfortunately, these data are lacking. As mentioned earlier, we only have data on the total number of cross-border workers. How many of these workers are public servants one could only estimate. It is also unclear how many workers work from home. This lack of data causes a situation where relevant consequences at macro level are hardly measurable.

Under Theme 3, Euregional cohesion, we describe the likely cross-border effects on European cohesion and governance structures. This theme focuses on collaboration between governments, citizens and employers. In the context of the new legislation discussed above, one might study whether and how the Member States in which the relevant employers reside and the authorities to which the relevant public servants are subject could collaborate across borders, so as to alleviate the consequences of the WNRA. This might, for example, be achieved through improved mutual communication, guidelines and (increased) collaboration when handling information requests.

Table 1 below illustrates how these themes have been elaborated through a set of important European principles that serve as a basis for defining benchmarks and appropriate indicators, which help structuring the subsequent analysis of cross-border effects this dossier.

2.3.2. Social security/Pension Dossier: Principles, Benchmarks and Indicators for a Positive Situation in Border Regions

Table 1: Principles, benchmarks and indicators for the social security and pension situations of cross-border public servants after the implementation of the WNRA

Theme	Principles	Benchmark	Indicators
European integration	<p>European Regulations:</p> <ul style="list-style-type: none"> - Regulation (EC) No. <u>883/2004</u> on the coordination of social security systems. - Regulation (EC) No. <u>987/2009</u> laying down the procedure for <i>implementing</i> (italics added, MW) Regulation (EC) No. 883/2004 on the coordination of social security systems. <p>Free movement of persons:</p> <ul style="list-style-type: none"> - Article 45 TFEU²⁴ - Art. 48 TFEU - Recital 1 Regulation No. 883/2004 - Recital 17 Regulation No. 883/2004 - Recital 8 Regulation No. 987/2009 - Recital 9 Regulation No. 987/2009 <p>To determine applicable legislation:</p> <ul style="list-style-type: none"> - Recital 15 Regulation No. 883/2004 - Art. 11 Regulation No. 883/2004 - Art. 13 Regulation No. 883/2004 - Art. 14 Regulation No. 987/2009 <p>Equal treatment:</p> <ul style="list-style-type: none"> - Art. 18 TFEU - Recital 5 Regulation No. 883/2004 - Recital 8 Regulation No. 883/2004 - Art. 4 Regulation No. 883/2004 	<p>Comparison of the current living/work situation of former cross-border public servants with the projected situation after the entry into force of the WNRA in terms of social security and pension status.</p> <p>After 1 January 2020, former public servants in a cross-border living/work situation will no longer automatically resort under Dutch social security legislation. Compared to the old situation, this may imply a change in the applicable social security legislation for (migrating) cross-border workers.</p> <p>In purely internal living/work situations (having job and residence in NL), the national legislation always applies, regardless of the number of hours worked at home or in the office.</p>	<p>In purely internal living/work situations, the introduction of the WNRA will have no impact on the social security position of former public servants, in that they will remain insured in the Netherlands and entitled to a pension under the Dutch national pension scheme.</p> <p>In a cross-border living/work situation, however, the situation of former public servants may change following the implementation of the WNRA: the old status of ‘public servant’ will cease to exist, and former public servants working in two or more Member States may become subject to the social security scheme of another Member State.</p> <p>Depending on the country of residence and/or source State, pension benefits are taxed in the country of residence and/or source State. Former public servants in a cross-border living/work situation may thus find themselves in a less favourable situation than before the application of the WNRA.</p>

²⁴ TFEU: Treaty on the Functioning of the European Union.

	<p>Promoting European integration:</p> <ul style="list-style-type: none"> - Art. 9 TFEU <p>European directives:</p> <ul style="list-style-type: none"> - Directive 2003/41/EC - Directive EU 2016/2341 <p>Tax treaties:</p> <ul style="list-style-type: none"> - avoiding double taxation 		
Sustainable development/ socio-economic development	<p>Sustainable development:</p> <ul style="list-style-type: none"> - Art. 3, par. 3 TEU²⁵ 	N/A	N/A
Euregional cohesion	<p>Economic, social and territorial cohesion:</p> <ul style="list-style-type: none"> - Article 174 TFEU <p>Equality between Member States:</p> <ul style="list-style-type: none"> - Art. 4 TEU <p>Closer cooperation:</p> <ul style="list-style-type: none"> - Art. 20 TEU - Recital 2 Regulation No. 987/2009 - Recital 8 Regulation No. 987/2009 - Recital 9 Regulation No. 987/2009 	Comparison of the social security and pension statuses of former public servants in a cross-border living/work situation before and after the implementation of the WNRA.	Employers and employees may start to avoid cross-border situations due to the application of the WNRA, on the grounds that these situations cause – potentially detrimental – financial or administrative complications. Does this mean that former public servants in a cross-border living/work situation may face discrimination by residence, given that the performance of additional activities in the Member State of residence (as opposed to solely in the State of employment) may impact the applicable social security system? Could there also be adverse effects with regard to pensions?

²⁵ TEU: Treaty on the European Union.

Based on the benchmarks and indicators mentioned above, some situations will be subjected to a cross-border impact assessment. The subsequent findings can serve as a basis for conclusions about the cross-border effects of the implementation of the WNRA for workers in a cross-border living/work situation.

3. Applicable rules for cross-border employment

3.1. Social security/contribution levy

Under European law, as under national legislation, employees enjoy social protection and the right to social security. In cross-border situations, Regulation No. 883/2004 provides at European level that, in principle, only one national social security scheme can apply. This Regulation defines the applicable national social security system, in principle, as the State where the employee carries out work activities.²⁶ In the case of public servants, however, the designated scheme is the social security legislation of the Member State governing the administrative body that employs these public servants.

Special allocation rules apply in the event that activities are carried out in two or more Member States:²⁷ If these activities are carried out simultaneously as a public servant in one Member State and as an employee in another Member State, the insurance obligation (right to levy social contributions) is assigned to the State in which the activities are carried out as a public servant.²⁸ If the activities are carried out in two or more Member States as a public servant, then the same rules apply as for workers carrying out activities in two or more Member States. The following table (Table 2) sets out the rules to be followed when a cross-border worker carries out work as an employee in two or more Member States.

The entry into force of the WNRA raises a number of questions. For example, is it still possible under Article 16 of Regulation 883/2004 to retain the status of public servant for the purposes of Regulation 883/2004? Article 16 of Regulation No. 883/2004 provides that the competent bodies of two or more Member States may, in the interests of a person or groups of persons, conclude an agreement derogating from the regular rules of conflict. However, the policy of the Social Insurance Bank (*Sociale Verzekeringsbank* – SVB), the competent body in this matter, is to conclude such agreements only in the interest of individuals and regarding temporary situations. In principle, such agreements are valid for a maximum period of five years.²⁹ Another question is whether the public servants in question could be – for the purposes of Regulation No. 883/2004 – be designated as public servants. According to a memo from the Ministry of Social Affairs and Employment, it is not possible to invoke Article 16 of Regulation No. 883/2004 because the Netherlands does not have a separate social security system for public servants.³⁰

²⁶ Art. 11 Regulation No. 883/2004.

²⁷ Art. 13 Regulation No. 883/2004.

²⁸ Art. 13 paragraph 4 Regulation No. 883/2004.

²⁹ In highly exceptional situations, the five-year period is extended. SVB policy rules, SB2147, https://puc.overheid.nl/svb/doc/PUC_2147_20/9/, consulted on 15 August 2019.

³⁰ Memo from the Ministry of Social Affairs and Employment of 28 January 2019, No. 2019-0000020142.

Table 2: Allocation of the applicable social security legislation for workers carrying out multiple work activities³¹

Activities carried out in the country of residence and country of employment	Employer(s)	Allocation of insurance obligation to:
Substantial amount (> 25%)³² in country of residence	Regardless of the number of employers	Country of residence
Less than substantial amount (< 25%) in country of residence	One employer	Country where the employer is established
	Two employers established outside the worker's country of residence, but in the same Member State	Country where the employer is established
	Two employers, only one of whom is established in the worker's country of residence	Member State other than the country of residence
	Multiple employers, at least two of whom are not established in the worker's country of residence	Country of residence
	Working in two or more Member States for an employer established outside the EU/EEA/Switzerland	Country of residence

3.2. Pensions

As a result of the entry into force of the new legislation, the pension situation of these cross-border workers will become more complicated, particularly with respect to the question of where their pensions will be taxed.

The Dutch pension system rests on several 'pillars'. The application of the WNRA will not impact all of these pillars equally. Each pillar constitutes a different type of pension. In the Netherlands, the first pillar is the General Old Age Pensions Act (*Algemene Ouderdomswet – AOW*) state pension. This is the first tier of old-age provisions. The AOW pension is linked to the Dutch minimum wage, the final amount of which depends on family composition, among other things, and which is accrued by residents or non-residents who enjoy wages from employment in the Netherlands that are subject to

³¹ See Article 13(1) of Regulation No. 883/2004 in conjunction with Article 14(8) and (10) of Regulation No. 987/2009. See also M.J.G.A.M. Weerepas, *Grenswerkers: enige hardnekkige knelpunten*, WFR 2019/146.

³² See also the Central Appeals Tribunal (*Centrale Raad van Beroep – CRvB*) case law of 29 February 2019, No. 18-1954 AOW, ECLI:NL:CRVB:2019:852, ABkort 2019/174, paragraphs 4.2.5.2 and 4.3.2.2., in which the Tribunal decided that, even though the percentage was lower than 25%, the criterion of 'substantial performance of work activities in the state of residence' might still be satisfied. See also North Netherlands Appeals Tribunal (*Rb Noord-Nederland*) 18 April 2019, No. 18/1362, ECLI:NL:RBNNE:2019:1582, where 21.87% of the activities was reportedly carried out in the state of residence and where the Court ruled that this did not constitute a substantial performance of activities.

income tax there.³³ The right is accrued on the basis of the number of insured years. An insured person builds up 100% AOW benefit in 50 years. Each year that a person has not been insured incurs a 2% reduction of the AOW benefit. The current AOW retirement age is 66 years and four months. The AOW is financed by the so-called pay-as-you-go system (Dutch: *omslagstelsel*).

The second pillar consists of collective occupational pensions, managed by pension funds or insurance companies. These pension funds comprise sectoral pension funds, corporate pension funds and occupational pension funds. This pillar is financed by collective premiums paid by those involved.

The third and final pillar is voluntary pension insurance.

For current cross-border public servants, the first two pillars are particularly important. As stated above, the AOW applies to all insured parties in the Netherlands. Public servants accrue their supplementary pensions with a special pension fund for government employees: the *Algemeen Burgerlijk Pensioenfonds* (ABP).

Cross-border pension benefits

In an international context, taxing rights on private pensions are, in principle, assigned to the State of residence. Under certain conditions, however, the right to levy taxes may shift to the source-state, i.e. the State that pays the pension.³⁴

In the case of state pensions, the Netherlands has the right to levy taxes on payments of wages or retirement benefits for services rendered to the State of the Netherlands, a political subdivision thereof or a local authority governed by public law.³⁵

The introduction of the WNRA raises the question of whether the change in the employment relationship from public servant to employee must lead to a distinction between a public and a private pension when pensions are paid out. There is prior case law on this matter, ruling that pension payments must be split into a state pension and a private pension on the basis of years of public service. A state pension can be defined as a pension whereby the retirement benefits, the contributions or the lump sum are paid by the State administration.³⁶ This led to interpretation problems in the relationship with Germany,³⁷ where the German authorities took the view that the capacity of the party paying the pension should determine the final qualification of the pension scheme.³⁸ The 2012 Netherlands-Germany tax treaty contains the solution: a pension is qualified as a state pension if it was accrued as part of a public-law employment relationship, meaning that it does not matter who pays out the retirement benefits.³⁹ Will the change in status from public servant to employee lead to the inclusion of specific provisions in other tax treaties? Also note that Dutch treaty

³³ See Article 6(1) of the AOW (General Old Age Pensions Act). See also Article 6a, paragraph 1, section a of the AOW: the insured person shall be the person whose insurance as per this Act results from the application of provisions in a treaty or of a decree issued by an international public-law organisation.

³⁴ See, for example, Article 18(2) of the Netherlands-Belgium Treaty 2001 and Article 17(2) of the Netherlands-Germany Treaty 2012.

³⁵ See, for example, Article 19(2) of the Netherlands-Belgium Treaty 2001 and Article 18(2) of the Netherlands-Germany Treaty 2012.

³⁶ *Javasche Bank* rulings, HR 8 July 1980, No. 19 875, BNB 1980/259, HR 12 June 1991, No. 27 310, BNB 1991/312, and see also the *PTT* ruling, HR 23 November 1994, No. 29 935, BNB 1995/117.

³⁷ HR 5 December 2008, No. 43 722, BNB 2009/199. See B. Starink, *Belastingheffing over pensioenuitkeringen in grensoverschrijdende situaties*, in: A.H.H. Bollen-Vandenboorn (ed.), *Pensioen en de belangrijkste pensioenvoorzieningen*, tenth edition, Sdu 2019, p. 411.

³⁸ See also M.J.G.A.M. Weerepas, *Grenswerkers: enige hardnekkige knelpunten*, WFR 2019/146.

³⁹ Protocol XIV to the Netherlands-Germany Treaty 2012.

policy aims to achieve full-fledged source-state levying, eliminating the need for distinguishing between private and public pensions.⁴⁰ Other States may not share this point of view, which would make full-fledged source-state levying unattainable. In this event, the Netherlands will seek to include a provision that determines which part of the combined pension provisions is considered to be a private pension and which part a public pension.⁴¹

The WNRA may affect the qualification of the second-pillar pension in an international context. According to the Dutch Minister of Social Affairs and Employment, in implementation practice, the existence of a public service appointment is generally recognised as a qualification criterion. According to the Minister, this criterion will no longer work effectively, however, following the application of the WNRA. The treaty criterion of 'employment with a Dutch public-law body' must be applied more directly to the interpretation of the concept of 'public administration post', irrespective of whether it concerns an appointment as public official or an employment contract. In principle, according to the Minister, the allocation of the taxing rights will not change, meaning the Netherlands will retain the right to levy taxes on retirement benefits for the concerned groups.⁴² It is clear, however, that a dialogue needs to be started with Belgium and Germany regarding the interpretation of the applicable pension articles in the respective tax treaties, since a protocol provision regarding state pensions expressly refers to 'public employment'.⁴³ The question is how Belgium and Germany and other relevant countries will respond to the Dutch opinion. It is important, indeed, that this is clarified. This cross-border effect of the WNRA should have been clarified by now.

3.3. Several sample calculations

A number of calculations using the figures of 2018 show that a change in the applicable social security legislation can have substantial consequences. Note that we have used the year 2018 because it covers all of the calendar months, i.e. including holiday allowance and possible end-of-year bonuses. Contrary to the Netherlands, Belgium puts no cap on social security contributions in its employment relationships. The examples include a number of cases involving Belgium and one case concerning Germany. Note, however, that the indication of higher contributions does not necessarily make a person worse off overall. In terms of benefits, this depends on the applicable legislation and the individual situation of the person concerned.

If the right to levy social contributions shifts to Belgium and Germany, Dutch employers will have to deal with foreign social security bodies. This can increase their administrative burden. Also note that we have used the Dutch salary to calculate the Belgian and German contributions.

⁴⁰ See also *Besluit Internationale aspecten van pensioenen en stamrechten* (Decision on International Aspects of Pensions and Periodic Benefits Entitlements), No. DGB2015/7010M, BNB 2016/124.

⁴¹ Policy memorandum on tax treaties 2011, pp. 55 and 56.

⁴² This should also apply to the income earned by the public servant during their active period.

⁴³ Letter of 8 July 2019 *Nadere vragen over de herziening EU-verordening coördinatie sociale zekerheidsstelsels* (Further questions on the revision of the EU regulation on the coordination of social security systems), No. 2019-0000099383, pp. 4 and 5.

A. Comparison of social security contributions for insurance in Belgium or the Netherlands

The first example in Table 3 (below) concerns an employee who works in the Netherlands for 0.9 FTEs. For the remaining 0.1 FTE, (s)he is employed as a public servant in Belgium. The social security obligation is currently assigned to the Netherlands. Should the WNRA come into force, the social security obligation and compulsory contributions will be assigned to Belgium. The comparison in table 3 (below) shows that, if the social security obligation shifts from the Netherlands to Belgium, the employee in question will save € 1,229.60 in contributions. Their employer, instead, will be due to pay substantially more contributions (€ 9,603.36).

The example in Table 4 (below) concerns a person living in Belgium who works part-time (0.2 FTE) in the Netherlands as a public servant and works in Belgium for 0.8 FTE. At the point in time, the applicable social security legislation is that of the Netherlands because the person is a public servant there. If the social contributions obligation shifts from the Netherlands to Belgium, this person will face increased costs of € 979.58 and their employer will also face an increase in charges of € 2,222.41.

The example in Table 5 (below) concerns a person living in Belgium who has been appointed as a public servant for 1.0 FTE in the Netherlands. In addition, this person also works as a public servant for 0.1 FTE in Belgium. At present, the social security obligation is assigned to the Netherlands, pursuant to Article 13 of Regulation No. 883/2004. The calculation shows that, for those with a high salary, a shift in the allocation of the insurance obligation from the Netherlands to Belgium causes a substantial increase (of € 27,303.31) in the employer's charges. This is due to the fact that Belgian legislation does not include a cap on payable social security contributions. The employee's charges also increase (by € 1,498.28).

Table 3: Sample calculation (NL-BE) of the potential consequences (i.e. difference in contribution obligation) of the introduction of the WNRA on 1 January 2020 after a shift in insurance obligation when working in two countries.

Employee 0.9 FTE in NL, 0.1 FTE in Belgium												
Belgian wage for the purposes of wage tax	Gross salary	Part-time factor	National Social Security contribution standard salary	National Social Security contribution holiday pay only	National Social Security contribution benefit	Special contribution to social security	Employee's share of social security	Employer's contribution for social security	Reduction of employer's contribution	-	Employer's share of social security	Total social security
Total 12 months	57,399.30	90%	7,553.08	531.38	614.86	607.47	9,306.79	17,069.98	0	-	17,069.98	26,376.77
Dutch national insurance (SV) contributions	Wage for social insurance purposes	Part-time factor	National insurance contribution (payroll tax table)	National insurance contribution ('bijzonder tarief' [special rate])	-	-	Employee's share of social security	Work and Income (Capacity for Work) Act contribution (WIA)	Healthcare Insurance Act contribution (ZVW)	Public Sector Social Security Implementation Fund contribution (UFO)	Employer's share of social security	Total social security
Total 12 months	63,848.05	90%	9,685.67	850.72	-	-	10,536.39	3,698.31	3,768.31	425.87	7,466.62	18,003.01
TOTAL DIFFERENCE							1,229.60				-9,603.36	-8,373.76

Table 4: Sample calculation (NL-BE) of the potential consequences (difference in contribution obligation) of the introduction of the WNRA on 1 January 2020 after a shift in insurance obligation when working in two countries.

Employee 0.2 FTE in NI, 0.8 FTE in Belgium												
Belgian wage for the purposes of wage tax	Gross salary	Part-time factor	National Social Security contribution standard salary	National Social Security contribution holiday pay only	National Social Security contribution benefit	Special contribution to social security	Employee's share of social security	Employer's contribution for social security	Reduction of employer's contribution	-	Employer's share of social security	Total social security
Total 12 months	16893,98	20%	2096,85	-	102,25	-	2.199,10	4382,22	-	-	4.382,22	6.581,32
Dutch national insurance (SV) contributions	Wage for social insurance purposes	Part-time factor	National insurance contribution (payroll tax table)	National insurance contribution ('bijzonder tarief' [special rate])	-	-	Employee's share of social security	Work and Income (Capacity for Work) Act contribution (WIA)	Healthcare Insurance Act contribution (ZVW)	Public Sector Social Security Implementation Fund contribution (UFO)	Dutch national insurance (SV) contributions	Total social security
Total 12 months	63.848,05	20%	1.157,51	62,01	-	-	1.219,52	1.069,63	1.090,18	123,18	2.159,81	3.379,33
TOTAL DIFFERENCE							-979,58				-2.222,42	-3.201,99

Table 5: Sample calculation (NL-BE) of the potential consequences (difference in contribution obligation) of the introduction of the WNRA on 1 January 2020 after a shift in insurance obligation when working in two countries.

Employee 1.0 FTE in NL, 0.1 FTE Belgium (public servant)												
Belgian wage for the purposes of wage tax	Gross salary	Part-time factor	National Social Security contribution standard salary	National Social Security contribution holiday pay only	National Social Security contribution benefit	Special contribution to social security	Employee's share of social security	Employer's contribution for social security	Reduction of employer's contribution	-	Employer's share of social security	Total social security
Total 12 months	113.816,00	100%	15.424,38	1.086,80	1.220,41	619,68	18.351,27	35.732,38	-989,9	-	34.742,48	53.093,75
Dutch national insurance (SV) contributions	Wage for social insurance purposes	Part-time factor	National insurance contribution (payroll tax table)	National insurance contribution ('bijzonder tarief' [special rate])	-	-	Employee's share of social security	Work and Income (Capacity for Work) Act contribution (WIA)	Healthcare Insurance Act contribution (ZVW)	Public Sector Social Security Implementation Fund contribution (UFO)	Employer's share of social security	Total social security
Total 12 months	134.011,84	100%	16.214,55	638,44	-	-	16.852,99	3.687,25	3.751,92	425,27	7.439,17	24.292,18
TOTAL DIFFERENCE							-1.498,28				-27.303,31	-28.801,59

B. Comparison of social security insurance contributions in Germany or the Netherlands

The next example in Table 6 (below) concerns a person who works for two different employers in the Netherlands and Germany. In the Netherlands, (s)he has a part-time appointment of only 16% as a public servant. According to the allocation rule in Regulation 883/2004, (s)he should be insured in the Netherlands. However, based on (an) Article 16 of Regulation No. 883/2004 (agreement), (s)he is insured in Germany. This example illustrates the consequences if an extraordinary allocation of the social security obligation, i.e. to Germany instead of the Netherlands, has been agreed. If the allocation of the compulsory social contributions shifts to the Netherlands, the following picture – as illustrated below – emerges:

This comparison shows that on the one hand, if the social security obligation is assigned to the Netherlands instead of Germany, the employer's burden decreases, though not by a large amount: from € 1,470.89 to € 1,129.40. If it changes in the opposite direction, however, there is an increase.

On the other hand, the social security contributions owed by the relevant employee show a substantial difference of € 1,129.91, amounting to € 400.19 under compulsory insurance in the Netherlands and € 1,530.10 under compulsory insurance in Germany.

Table 6: Sample calculation (NL-D) of the potential consequences (difference in contribution obligation) of the introduction of the WNRA on 1 January 2020 after a shift in insurance obligation when working in two countries.

Employee public servant NL, social insurance in D (art 16 Reg.) – part 1									
German national insurance contributions	Gross salary (full time)	Part-time factor	State pension scheme (<i>Rentenversicherung</i>)	Unemployment insurance	Maternity expense levy	Health insurance voluntary membership	Supplementary contribution (<i>Zusatzbeitrag</i>) voluntary membership	Healthcare Insurance voluntary membership	Employee share of social security
Total 12 months	46.567	16%	734,23	118,47	0	573,36	0	104,04	1.530,10
Dutch national insurance (SV) contributions	Wage for social insurance purposes	Part-time factor	National insurance contribution (payroll tax table)	National insurance contribution ('bijzonder tarief' [special rate])	-	-	-	-	Employee share of social security
Total 12 months	8.262,66	-	124,96	275,23	-	-	-	-	400,19
TOTAL DIFFERENCE (part 1)									-1.129,91
Employee public servant NL, social insurance in D (art 16 Reg.) – part 2									
German national insurance contributions	State pension scheme	Unemployment insurance	Maternity expense levy	Health insurance voluntary membership	Supplementary contribution (<i>Zusatzbeitrag</i>) voluntary membership	Healthcare Insurance voluntary membership	Employer's share of social security	Total social security	
Total 12 months	734,23	118,47	32,95	423,12	75,12	87,99	1.470,89	3.000,99	
Dutch national insurance (SV) contributions	Work and Income (Capacity for Work) Act contribution (WIA)	Healthcare Insurance Act contribution (ZVW)	Public Sector Social Security Implementation Fund contribution (UFO)				Employer's share of social security	Total social security	
Total 12 months	559,32	570,08	64,39				1.129,40	1.529,59	
TOTAL DIFFERENCE (part 2)							-341,94	-1.471,40	

4. Evaluation of European Integration

In this evaluation of the 'European Integration' theme, we compare the social security situations of the former public servants who carry out work in two or more Member States before and after the entry into force of the WNRA. Alongside the question of whether the introduction of the new legislation promotes or hampers European integration, this evaluation also includes an assessment of the practical impact on cross-border workers.

Imagine a cross-border public servant who also works from home in their country of residence. Under current legislation, which will lapse after the implementation of the WNRA on 1 January 2020, Dutch public servants (in the education sector) have the status of public servant, ensuring that any person with this status is insured under the Dutch national social security system. Through the intended lifting of this special status, the status of public servant for the groups concerned will become harmonised with private-sector employees in terms of their legal position.

According to European legislation, cross-border workers can only be subject to one national social security law.⁴⁴ To ensure the equal treatment of all people working within the territory of a Member State, it is provided that the legislation of the country of employment shall apply.⁴⁵ In this case, that would be the Netherlands. **However, this person not only works in the Netherlands, but also from home, i.e. from Belgium or Germany. The designation of the State with the applicable social security legislation depends on the number of hours worked in the State of residence and/or the salary received there.** The legislation of the country of employment can still be designated for employees who work less than 25% of their time in the state of residence and/or receive less than 25% of their salary there.⁴⁶ **If the 25% criterion is met, however, the country of residence becomes competent for social security purposes.**⁴⁷ In Belgium, this means that those concerned must register with a Belgian health insurance fund. In Germany, these employees must take out insurance with the German national health insurance scheme (*Krankenkasse*), or apply for voluntary insurance (*freiwillige Versicherung*) or private insurance (*private Versicherung*), depending on their income levels.

Those who will (instead) come to be covered under the Dutch Public Service Act 2017 will be insured in accordance with Dutch national social security legislation. Regulation No. 883/2004 has a special provision for this public servant status, as a result of which the national social security legislation will continue to apply to public servants appointed in the Netherlands. This becomes different once they carry out activities in two or more Member States. Depending on the nature of the activities, either Dutch legislation will be the designated legislation or the provision regarding the pursuit of activities as an employee in two or more Member States will apply.⁴⁸

The situation of public servants working in the Netherlands in a cross-border position may change due to the implementation of the WNRA. The Cross-Border Impact Assessment investigates whether this changing situation promotes or hinders European integration and what this means for the inhabitants of the border regions. Although the situation of former public servants working in two or more Member States will become no simpler as of 1 January 2020 and the application of the new legislation

⁴⁴ Art. 11 Regulation No. 883/2004. This can be described as the exclusive effect.

⁴⁵ Art. 13 Regulation No. 883/2004.

⁴⁶ See illustration in table 2 above.

⁴⁷ Art. 14 paragraph 8 Regulation No. 987/2009.

⁴⁸ Article 13(4) Regulation No. 883/2004 and Article 13(1) Regulation No. 883/2004 and Article 14(8) and (10) Regulation No. 987/2009.

is unlikely to promote working in the border region – just think of the additional administrative and possibly financial burdens on employees and employers, this is not a new situation. In today's economy, employers are already dealing with comparable situations of cross-border workers, including the applicable Regulation No. 883/2004.

Also note that, importantly, the applicable legislation for activities carried out in two or more Member States is indicated in the European context using a document known as the "A1-declaration".⁴⁹ **In any case, employers with cross-border workers in any of the above situations need to have their employees apply for a correct A1 certificate.**

5. Evaluation sustainable development/ socio-economic development theme

The evaluation of the 'Sustainable development and socio-economic development' theme requires figures that clearly indicate how many of the former public servants will be facing a potential change in their social contributions obligation after the entry into force of the WNRA. However, as mentioned above, these figures are lacking. Meanwhile, there is data available on the number of cross-border workers. Based on the available data, still, we cannot clearly establish whether the sustainable economic development of the border regions will be promoted or hampered by the implementation of the WNRA. As Regulation 883/2004 is only a coordinating regulation, sustainable development is not backed but merely promoted by European legislation. As noted before, it would be recommendable if Statistics Netherlands (CBS) would provide more clarity about the number of cross-border workers employed as public servants in the Netherlands. In addition, our understanding of the matter would be improved if we obtained clarity on the number of public servants who work in other Member States alongside their job in the Netherlands.

6. Evaluation of the Euregional Cohesion theme

The theme of 'Euregional cohesion' comprises an analysis of the situations of Dutch former public servants before and following the application of the WNRA. As indicated above, in a purely internal situation, nothing will change with regard to social security and pensions after the WNRA's enactment. The social security situation of the cross-border workers as described in Section 3, however, may change due to the implementation of the WNRA. In addition, there may be problems concerning the qualification of future pension benefits (for taxation purposes).

Note further that in the context of Dutch border regions one should be prepared for the effects of insufficient information provision. This is because the enactment of the WNRA may entail administrative and financial burdens for both employers and employees. These burdens may include additional (administrative) costs relating to wage calculation. This may make it less attractive for employers to employ cross-border workers. Foreign authorities will also have to be informed of the effective date of the new legislation.

For employers, there seems to be no added value in collaboration, which may cause both employers and employees to avoid cross-border situations.

⁴⁹ In principle, host States must respect A1 declarations. Only in exceptional cases can they be ignored. See, among other things, the judgment in Altun, ECJ EU 6 February 2018, C-359/16, ECLI:EU:C:2018:63.

7. Conclusions and recommendations from a Euregional perspective

7.1 Substantive conclusions

It is clear that the legislator paid scant attention to cross-border effects when designing and adopting the WNRA. These effects are still not entirely clear.

Depending on the individual situation, the effects on social security, and particularly on the levying of social security contributions, may be that both employer and employee will face increased costs if the insurance obligation shifts from the Netherlands to another State, for example Belgium. In the case of Belgium, this is mainly attributable to the fact that Belgium has no cap on payable contributions. In general, the administrative burdens for Dutch employers increase when forced to deal with foreign bodies.

The question is, however, how many cross-border public servants are affected. One recommendation would be for Statistics Netherlands (CBS) to clarify how many of the cross-border workers have a public servant status. It would also be useful to know how many of these public servants also conduct (additional) work activities in another Member State.

As far as pensions are concerned, (administrative) burdens may increase due to the fact that pensions will have to be split into public and private pensions. The Netherlands is of the opinion that the application of the WNRA will not affect its right to levy taxes on pensions. However, it is not yet clear whether the relevant foreign authorities will accept the Dutch view.

7.2 Future prospects

It should be noted that this report was finalised on 13 August 2019. At the time of finishing the report, a number of elements were still unclear and the matter was still open-ended. For example, there have been Parliamentary Questions that still await a response from the relevant Dutch ministers. It is therefore important to keep monitoring this subject closely. The Cross-Border Impact Assessment can play a role in doing so.

ITEM is an initiative of Maastricht University (UM), the Dutch Centre of Expertise and Innovation on Demographic Changes (NEIMED), Zuyd Hogeschool, the city of Maastricht, the Meuse-Rhine Euregion (EMR) and the (Dutch) Province of Limburg.

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

Mailing address:

Postbus 616, 6200 MD Maastricht, The Netherlands

Visitors:

Bouillonstraat 1-3, 6211 LH Maastricht, The Netherlands

Avenue Céramique 50, 6221 KV Maastricht, The Netherlands

T: 0031 (0) 43 388 32 33

E: item@maastrichtuniversity.nl

www.twitter.com/ITEM_UM

ITEM Cross-Border Portal:

<https://itemcrossborderportal.maastrichtuniversity.nl/p/homepage>

